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In the

SUPREME COURT OF THE UNITED STATES

October Term, 1980

RUBIN KREMER,

Petitioner,

-against-

CHEMICAL CONSTRUCTION CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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January 13, 1981

QUESTIONS PRESENTED

In a Title VII religious discrimination case, the Second Circuit--regarding itself as bound by its decision in an earlier pro se case in which none of the relevant authority (including this Court's interpretations of the de novo hearing requirement of Title VII) was briefed or discussed, and despite the contrary views of two other courts of appeals, eight district courts and the EEOC--held that the Federal claim was barred by the res judicata effect of a sharply limited state court review of a mandatory state agency determination under a state discrimination statute.

This petition thus raises the following questions:

1. Whether a Title VII action commenced in the Federal courts is barred by a plaintiff's appeal of a mandatory state administrative determination to a state court under a sharply limited standard of review?

2. Whether the court of appeals' decision in Sinicropi v. Nassau County, 601 F.2d 60 (2d Cir.), cert. denied, 444 U.S. 983 (1979), should be applied retroactively, thereby denying petitioner the de novo Federal trial that he had sought for several years before Sinicropi was decided?

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RUBIN KREMER,

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-against-

CHEMICAL CONSTRUCTION CORPORATION,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Rubin Kremer seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit, entered on June 2, 1980 (rehearing en banc denied October 15, 1980).

PRIOR OPINIONS

The opinion of the court of appeals is reported at 623 F.2d 786 (2d Cir. 1980), and appears at A. 01.* Two opinions of the United States District Court for the Southern District of New York in this case are reported at 477 F. Supp. 587 (S.D.N.Y. 1979) (Sofaer, J.), and 464 F. Supp. 468 (S.D.N.Y. 1978) (Pierce, J.), and appear respectively at A. 12 and A. 28.

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* References to the Appendix to this petition will be cited as "A. ".

JURISDICTION

The judgment of the court of appeals, entered on June 2, 1980, appears at A. 01. The orders of that court of October 15, 1980, denying a timely filed petition for rehearing en banc (Judges Oakes and Newman dissenting), appear at A. 40-41. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). Jurisdiction in the district court was based on 42 U.S.C. § 2000e-5(f) and 28 U.S.C. §§ 1331(a), 1337(a), 1343(a)(4).

STATUTES INVOLVED

The pertinent text of each of the statutes involved appears as indicated:

42 U.S.C. § 2000e-2(a) appears at A. 42.

42 U.S.C. § 2000e-5(c) appears at A. 42.

N. Y. Exec. Law § 296(1)(a) appears at A. 42.

N. Y. Exec. Law § 297-a(7)(e) appears at A. 42.

N. Y. Exec. Law § 298 appears at A. 43.

N. Y. Civ. Prac. Law § 7803(3) and (4) appears at A. 43.

STATEMENT OF THE CASE

Petitioner Rubin Kremer is a 63-year-old engineer who emigrated from Poland in 1970. Mr. Kremer was fired and denied reemployment by respondent Chemical Construction Corporation ("Chemico") allegedly because of his Jewish faith and his national origin. Petitioner is appealing to this Court because his religious and ethnic discrimination claims under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq., were dismissed below without a judicial hearing despite the Congressional mandate in Title VII and the decisions of this Court that require a de novo

Federal court hearing of his claims.

A. Facts and State Proceedings. After his discharge, Mr. Kremer, acting pro se, filed a discrimination charge with the Equal Employment Opportunity Commission ("EEOC").* As required by the "deferral" provisions of Title VII,** the EEOC referred the complaint to the New York State Division of Human Rights ("NYHRD").

The NYHRD conducted what turned out to be the only investigation of petitioner's claims, and it was perfunctory at best.† Petitioner was summoned to "review" documents submitted by Chemico and was admonished by the functionary who conducted the session: "Read faster. I have to go for lunch." Subsequently, NYHRD issued its finding of no probable cause.

In his quest for a hearing at the administrative level, Mr. Kremer, still without counsel, appealed NYHRD's ruling to the New York State Human Rights Appeals Board and, thereafter, to the Appellate Division of the State Supreme Court. Under state law, both the Appeals Board and the Appellate

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* Petitioner had been employed by Chemico since 1973. A supervisor recommended a month before his discharge, "Hold for knowledge and skills." He was considered "technically competent . . . with excellent background", a "competent engineer". Shortly before he was fired, Mr. Kremer was removed from projects in which his work had produced cost savings and other improvements and was ordered to charge his time improperly and to waste time by needlessly writing up work.

Mr. Kremer was the only Jewish employee in his department. Other employees of the same job description who were laid off at the same time were later rehired, but Mr. Kremer was not despite repeated applications. Petitioner filed his charges under 42 U.S.C. § 2000e-2(a)(1974), A. 42.

** 42 U.S.C. § 2000e-5(c) (1974), A. 42.

† Petitioner presented his claims to the NYHRD under the state antidiscrimination statute. N.Y. EXEC. LAW § 296(1)(a) (McKinney Supp. 1972-1980), A. 42.

Division were limited to determining whether NYHRD's findings were "arbitrary or capricious" or "an abuse of discretion".* Neither had legal authority to hold a full hearing and neither had power to do more than remand to NYHRD for further investigation. The Appeals Board affirmed the determination of NYHRD and, without any hearing, the Appellate Division "confirmed" the Appeals Board order. Thus, Mr. Kremer's only court "hearing" (and that in a state, not a Federal court) occurred under a narrowly limited legal standard that prohibited anything approaching a de novo inquiry.

Relying entirely on NYHRD's "findings" and "record", the EEOC then decided that there was "not reasonable cause to believe the charge is true" and issued a right to sue letter so that petitioner could pursue his right to a trial de novo in a Federal court. This right exists regardless of the quality of mandatory administrative inquiries and proceedings.

B. Proceedings Below. Still without counsel, petitioner brought this action in the district court. Before filing its answer, respondent Chemico moved for dismissal or summary judgment on the ground of res judicata. Respondent, relying solely upon the decision in Mitchell v. National Broadcasting Company, 553 F.2d 265 (2d Cir. 1977), claimed that Mr. Kremer's appeal of the NYHRD's decision to the Appellate Division precluded any Federal court action. Mitchell had held that an employment discrimination action brought under 42 U.S.C. § 1981 (1974) is barred by the

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* See N.Y. EXEC. LAW § 297-a(7)(e) (McKinney 1972), A. 42; and N.Y. EXEC. LAW § 298 (McKinney Supp. 1972-1980), A. 43; N.Y. CIV. PRAC. LAW § 7803(3) and (4) (McKinney 1963), A. 43.

res judicata effect of an Appellate Division appeal from an NYHRD determination.

The district court initially denied respondent's motion in an opinion that carefully considered and rejected respondent's contention that the reasoning of Mitchell should be extended to Title VII cases. 464 F. Supp. 468 (Pierce, J.), A. 28. The district court concluded that significant distinctions between the statutory scheme of Title VII and the century-old section 1981 required different res judicata results. Id. at 472-73, A. 35-39.

Some months later, the Second Circuit decided another pro se case, Sinicropi v. Nassau County, 601 F.2d 60 (2d Cir.) (per curiam), cert. denied, 444 U.S. 983 (1979). The facts in Sinicropi were similar to those in Mitchell with one vital difference--Ms. Sinicropi was a Title VII complainant. The court of appeals, however, relied entirely on its reasoning in Mitchell and saw "no reason to distinguish between section 1981 and Title VII for res judicata purposes". 601 F.2d at 62. Neither the briefs in Sinicropi nor the cursory two-page per curiam opinion discussed either the legislative history or the decisions of this Court that mandate a de novo Federal hearing in Title VII cases. Nor was there any discussion of the seven district court opinions that had already reached a contrary result, with the four decided after Mitchell specifically distinguishing it as involving section 1981 rather than Title VII.*

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* See Gavin v. Peoples Natural Gas Co., 464 F. Supp. 622 (W.D. Pa. 1979), vacated and remanded on other grounds, 613 F.2d 482 (3d. Cir. 1980); Kremer v. Chemical Construction Corp., 464 F. Supp. 468 (S.D.N.Y. 1978) (Pierce, J.); Nickel v. Highway Industries, Inc., 441 F. Supp. 477 (W.D.

Armed with the Sinicropi decision, respondent Chemico renewed its motion to dismiss Mr. Kremer's complaint in the district court. In an opinion that urged the overruling of Sinicropi and that was highly critical of both Mitchell and Sinicropi, Judge Sofaer nevertheless found that "Sinicropi permits no choice" but to grant respondent's motion. 477 F. Supp. 587, A. 12. He added that "[t]o submit to . . . Sinicropi . . . is not to agree with [it]", that its conclusion "seems fanciful", that it "judicially revis[ed]" Title VII, and that its result would be to increase the burden on the Federal courts while, at the same time, undermining state antidiscrimination efforts. Id. at 591-593, A. 17-23.

Represented by counsel on appeal to the Second Circuit, petitioner urged that Sinicropi be overruled. Alternatively, he argued that it should be given prospective effect only, so that it would not apply where, as here, the state court appeal occurred before it was decided. The court of appeals panel refused to reconsider Sinicropi. 623 F.2d 786, 788, A. 04-05. On the retroactivity claim, it held that, despite the consistent line of district court decisions

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Wis. 1977); Al-Hamdani v. State University of New York, 438 F. Supp. 299 (W.D.N.Y. 1977); Beck v. Mather, 417 F. Supp. 648 (W.D. Va. 1976); Benneci v. Dep't of Labor, 388 F. Supp. 1080 (S.D.N.Y. 1975); Young v. South Side Packing Co., 369 F. Supp. 59 (E.D. Wis. 1973).

The Sinicropi court also ignored the commentators who sharply criticized extending Mitchell to Title VII actions. See e.g., Comment, State Appellate Court Judgment on Employment Discrimination is Res Judicata in Subsequent Federal Action Under Section 1981, 62 MINN. L. REV. 987 (1978); Note, 'Twas a Nibble and Not a Bite: Res Judicata and Section 1981, 53 N.Y.U. L. REV. 187 (1978).

holding that state court appeals did not bar Title VII actions, the Mitchell decision (which specifically left the question open, 553 F.2d at 275, n.13) put litigants on notice that Title VII cases would be precluded by state appeals. Id. at 789-90, A. 08-10.

Petitioner sought rehearing en banc. He was joined by the Equal Employment Opportunity Commission, as amicus curiae, in urging that Sinicropi be overruled.* Nevertheless, rehearing en banc was denied, Judges Oakes and Newman dissenting. A. 41.

REASONS FOR GRANTING THE WRIT

The decision below should be reviewed for four reasons:

(1) it conflicts with the decisions of two other circuit courts, and at least eight district court decisions;

(2) it conflicts with this Court's interpretation of Title VII in analogous cases;

(3) as stressed by the EEOC as amicus below, it frustrates the statutory scheme of Title VII in reaching a perverse and unjust result; and

(4) as emphasized by the district court opinion and the EEOC, its practical effect will be to increase the burden on the Federal courts, and at the same time, to undermine state administrative processes.

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* As the EEOC--the agency charged by Congress with the enforcement of Title VII--contended, "Sinicropi thwarts the clear Congressional purpose of affording Title VII complainants a right to a de novo hearing in court. . . ." EEOC Amicus Brief at 6, A. 53.

A copy of the EEOC's brief in support of Mr. Kremer's petition for a rehearing en banc appears at A. 44.

1. CONFLICTS AMONG THE CIRCUITS AND IN THE DISTRICT COURTS.

It is most significant that the Second Circuit's holding in Sinicropi, applied in this case, stands alone. As the Third Circuit recognized, Sinicropi is "the only circuit court case that does not adopt the majority view". Smouse v. General Electric Co., 626 F.2d 333, 336 (3d Cir. 1980).

The courts of appeals that have had an opportunity to consider the issue in the short time since Sinicropi was decided have refused to follow its holding and criticized its reasoning. See Smouse v. General Electric Co., supra at 335-36; Gunther v. Iowa State Men's Reformatory, 612 F.2d 1079, 1083-84 and n.6 (8th Cir.), cert. denied, U.S. , 100 S. Ct. 2942 (1980). (These decisions are discussed in more detail at pages 10-11, 17 below.) Decisions in other circuits suggest that they, too, are unlikely to follow Sinicropi.* Thus, while the particular facts of Smouse and Gunther allowed those decisions to rest on other grounds, they create a conflict among the circuits that this Court should resolve.

In addition, at least eight district courts around the nation have reached a result contrary to Sinicropi.** In the latest such decision, the district court in Maryland squarely confronted the preclusion issue in Sinicropi. The

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* See, e.g., Weahkee v. Perry, 587 F.2d 1256 (D.C. Cir. 1978); Garner v. Giarrusso, 571 F.2d 1330 (5th Cir. 1978); Batiste v. Furnco Construction Corp., 503 F.2d 447 (7th Cir. 1974), cert. denied, 420 U.S. 928 (1975); Cooper v. Philip Morris, Inc., 464 F.2d 9 (6th Cir. 1972).

** See Kralowec v. Prince George's County, Maryland, No. W-74-1384 (D. Md. Nov. 17, 1980), and cases cited p. 6 n.* supra.

court declined to follow Sinicropi, stating that "in the absence of guidance from the Supreme Court . . . this Court will follow the better-reasoned authority exemplified by Batiste [v. Furnco Construction Corp., supra] and Gunther [v. Iowa State Men's Reformatory, supra]". Kralowec v. Prince George's County Maryland, supra, slip op. at 11.

In short, every court not bound by Sinicropi has chosen not to follow it or has adopted contrary reasoning.

2. INCONSISTENCY WITH THIS COURT'S ANALYSIS

Unanimous decisions of this Court in analogous cases--which were neither argued by the parties nor discussed by the opinion in Sinicropi--leave no doubt that when Congress enacted Title VII, it intended to grant plaintiffs the right to a de novo Federal court hearing--a right denied by the court below. See, e.g., Chandler v. Roudebush, 425 U.S. 840 (1976); Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974); McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). (These decisions are discussed in more detail at pages 11-12, 15, 18 below.)

Indeed, only last term this Court expressly recognized, in a case in which there had been proceedings in both the NYHRD and the Appellate Division, that Title VII "provides a supplemental right to sue in Federal court if satisfactory relief is not obtained in state forums". New York Gaslight Club, Inc. v. Carey, 48 U.S.L.W. 4645, 4649 (June 9, 1980) (emphasis added).

3. FRUSTRATION OF STATUTORY SCHEME

a. Framework of Title VII

In enacting and amending Title VII, Congress

created a complex and carefully thought out structure for the resolution of employment discrimination claims. But when the Second Circuit decided Sinicropi, it relied solely on its reasoning in Mitchell, a section 1981 action, and gave no thought to the framework of Title VII. That framework goes far beyond the bare grant of Federal jurisdiction (now 28 U.S.C. § 1343) that is the only procedural provision dating from the Reconstruction Era statutes, such as section 1981 considered in Mitchell. The essential frameworks of the statutes--section 1981 and Title VII--are simply different.* The express Congressional grant of a de novo review right in Title VII sets it apart from section 1981 for res judicata purposes.**

"[T]he unique statutory scheme of Title VII", Gunther v. Iowa State Men's Reformatory, supra, 612 F.2d at 1084, n.6, applicable only to claims under that law, requires resort to the EEOC and to state antidiscrimination remedies. Detailed timetables for state and EEOC action are set forth. It is only after exhaustion of these remedies, intended to resolve complaints without Federal court involvement, that a

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* In sharp contrast to Title VII, section 1981 does not have the complex statutory structure, the legislative history or the judicial interpretations that establish the right to a de novo hearing under Title VII. No consideration was given during the passage of the Civil Rights Act of 1866 (of which section 1981 was a part) to the development of state antidiscrimination procedures. Thus, for example, prior recourse to state and Federal administrative remedies is not a prerequisite to bringing a Section 1981 action. See, e.g., Goss v. Revlon, Inc., 548 F.2d 405, 407 (2d Cir. 1976), cert. denied, 434 U.S. 968 (1977).

** The specific Congressional grant of a right to de novo review in Title VII overrides the more general statutory requirement of 28 U.S.C. § 1738, relied upon in Mitchell with respect to section 1981 actions, 553 F.2d at 274, that Federal courts must give full faith and credit to state court judgments.

claim may be brought to Federal court. But once the procedural prerequisites are met, "unlike other civil rights statutes, Title VII clearly provides for a de novo hearing in federal court". Id.

b. Right to a Trial De Novo.

A Title VII plaintiff has a "statutory right to attempt to establish his claim in a federal court". Alexander v. Gardner-Denver Co., supra, 415 U.S. at 56. "Congress intended Federal courts to exercise final responsibility for enforcement of Title VII." Id. Because Congress "considered the policy against discrimination to be of the 'highest priority'", id. at 47, it gave the Federal courts plenary powers to enforce Title VII, id. at 44, 47; Chandler v. Roudebush, supra, 425 U.S. at 844-845. In short, "employees are entitled under . . . Title VII . . . to . . . a trial de novo". Id.; see also Alexander v. Gardner-Denver Co., supra, 415 U.S. at 38; McDonnell Douglas Corp. v. Green, supra, 411 U.S. at 798-799.

This Court has noted that Congress in 1972 defeated attempts to give the EEOC the power to hear and determine cases, subject to judicial review. Chandler v. Roudebush, supra, 425 U.S. at 841. The EEOC may investigate claims, but whatever findings it makes are irrelevant in any subsequent suit. It strains credulity to believe that when Congress expressly rejected the notion that Federal bureaucrats could finally determine the rights of the parties, it intended to permit state bureaucrats to do so. See Voutsis v. Union Carbide Corp., 452 F.2d 889 (2d Cir. 1971), cert. denied, 406 U.S. 918 (1972), cited with approval in Alexander v. Gardner-Denver Co., supra, 415 U.S. at 49 n.11.

c. Role of State Proceedings Under Title VII.

In fact, Congress intended state proceedings to supplement rather than supplant Title VII rights. The Federal court forum is available despite resort to state procedures because Congress expressly intended "to accord parallel or overlapping remedies against discrimination", Alexander v. Gardner-Denver Co., supra, 415 U.S. at 47, and "to allow an individual to pursue independently his rights under both Title VII and other applicable state and federal statutes". Id. at 48. See also EEOC Amicus Brief at 10-11; A. 57-58.

The New York procedures followed in this case are precisely of the type that Congress intended to be used to supplement Title VII rights. However, Congress explicitly rejected these administrative procedures for the ultimate enforcement of Title VII.

The state proceedings begin with an administrative investigation. Only if probable cause is found and conciliation efforts fail is an adversarial hearing held. N.Y. Exec. Law § 297(4)(a) (McKinney, Supp. 1972-1980). Both the Human Rights Appeals Board and the Appellate Division have power only to determine whether the NYHRD's findings are supported by substantial evidence or are arbitrary, capricious or an abuse of discretion.* Thus, when petitioner went to the Appellate Division (incidentally, following the advice of an EEOC official that he had nothing to lose in doing so), he was, as a matter of law, merely seeking to obtain a full

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* N. Y. EXEC. LAW § 297-a(7) (McKinney 1972), A. 42; N. Y. EXEC. LAW § 298 (McKinney, Supp. 1972-1980), A. 43; CIV. PRAC. LAW § 7803(3) and (4) (McKinney 1963), A. 43.

administrative hearing. Under state law, he could not possibly have obtained a de novo judicial review. At most, the Appellate Division could have remanded to the NYHRD for further proceedings. Precisely because of its limited nature, such state judicial proceedings cannot transform an administrative investigation into the equivalent of the Federal court trial that Congress mandated.*

d. Misapplication of Res Judicata in Title VII Actions.

The issue that can be raised on appeal in the state court is not the same issue that Title VII requires the Federal court to hear de novo. As noted above, the Appellate Division can consider only the narrow question whether the NYHRD decision was arbitrary or capricious on the basis of the record developed by the agency. But the issue before a district court is different: it must determine whether there was in fact discrimination. In doing so, it must afford the opportunity for a "full scale inquiry", Voutsis v. Union Carbide Corp., supra, 452 F.2d at 893, and make a "fresh determination of the facts and issues". Weahkee v. Perry, supra, 587 F.2d at 1263. For example, a district court may not "abdicate its responsibility" to conduct a de

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* In addition, as petitioner showed below, he has not had any meaningful hearing of his claim, either in the NYHRD, in the Appellate Division, or in the EEOC. He has never had an opportunity to confront any live representatives of Chemico or to subpoena and cross-examine any of the witnesses he repeatedly identified. The Appeals Board file did not include Mr. Kremer's letter arguing his position, and the Appellate Division file did not contain the certified administrative record. Indeed, the envelope containing the Appellate Division's order was postmarked three days before the order was dated. The EEOC investigation consisted merely of examining the NYHRD file, such as it was.

novo hearing by applying a substantial evidence test. Id. at 1265; see also Interpretive Memorandum of Senators Clark and Case, 110 Cong. Rec. 7213 (1964).*

Thus, because the issue that Congress mandated the Federal courts to determine de novo under Title VII--whether there was in fact discrimination--cannot be raised in a state appeal of an agency determination, Sinicropi is both inconsistent with Congressional intent and a misapplication of the principles of res judicata.** The fact that the dismissal by the NYHRD here was "confirmed" by a state court, under an abuse of discretion standard, does not alter the strong policy considerations which dictate that petitioner is entitled to a trial de novo in Federal court.

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* It is worth noting that even if NYHRD had held a hearing on petitioner's charges, the Appellate Division would have reviewed its determination applying only the "substantial evidence" standard of review. N.Y. EXEC. LAW § 297 (McKinney 1972 and Supp. 1980). The fact that (as noted in the text) a Federal court must conduct a de novo inquiry into the facts, rather than apply the lesser substantial evidence test, further demonstrates the inadequacy of the state court review in a Title VII action.

** The fact that the same "issue" that must be heard in Federal court was initially presented to the NYHRD cannot be determinative, since Title VII always requires resort to the state agency; thus, the issue presented to the state agency is necessarily identical to the one before the Federal court. But, of course, state agency determinations do not have res judicata effect. See Benneci v. Department of Labor, supra, 388 F. Supp. at 1082; Mitchell v. National Broadcasting Corp., supra, 553 F.2d at 278-80 (Feinberg, J., dissenting). If petitioner were seeking review of the single issue that was actually litigated in state court--whether the NYHRD determination was arbitrary or capricious or an abuse of discretion--he might be estopped from commencing a Federal action on that issue. But that is, of course, not the issue on which he seeks a Federal court hearing.

Even if, however, the application of res judicata had been technically correct, its use should still have been rejected in this case.

Res judicata is a flexible, equitable doctrine.*

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* So is the doctrine of retroactivity. The court below rejected petitioner's argument that Sinicropi, if not overruled, should be applied prospectively only, see 623 F.2d at 788, A. 06, although petitioner showed that he meets the standards governing nonretroactivity in civil cases set forth in Chevron Oil Co. v. Huson, 404 U.S. 97, 106-107 (1971). To support this conclusion, the court of appeals essentially relied only on the proposition that the result of Sinicropi was "clearly foreshadowed" by Mitchell. See 623 F.2d at 790, A. 09.

The facts simply are to the contrary.

Mitchell expressly reserved decision on the question of Title VII preclusion decided in Sinicropi. 553 F.2d at 275 n.13. When petitioner took his case to the Appellate Division, there were consistent, explicit holdings on this question by district courts across the country. See p. 6 n.* supra. While the dissenting opinion in Mitchell argued that the same result would follow in Title VII cases, litigants were entitled to rely upon the well-reasoned district court decisions that distinguished Mitchell, rather than upon a dissent that--like Sinicropi--did not even discuss the distinctions between Title VII and section 1981. Indeed, it is exalting form beyond all reasonable bounds to say that a pro se litigant should have anticipated the result in Sinicropi when a United States District Judge in this very case concluded, after lengthy analysis, that Mitchell did not control. Kremer v. Chemical Construction Corp., supra, 464 F. Supp. 487 (Pierce, J.), A. 28. Indeed, no one, least of all the agencies charged with the enforcement of Title VII, foresaw Sinicropi. As Judge Sofaer noted:

> "Indeed, in cases such as the present one, the state and federal agencies handling civil rights claims have uniformly assumed that federal review remained available under Title VII irrespective of prior proceedings. . . . There seems little equity in imposing a rule of forfeiture upon applicants such as Kremer under circumstances where even the expert agencies could not have anticipated one. . . . [I]ndividuals who sought review in state court prior to Sinicropi have lost their right to federal court consideration of an important federal claim without notice or fault." 477 F. Supp. at 593, A. 23-24.

The retroactivity decision is "a pragmatic one", Zweibon v. Mitchell, 606 F.2d 1172, 1177 (D.C. Cir. 1979), which is governed by "the plainest principles of justice". Gelpcke v.

It is not "rigidly applied", but is "qualified or rejected when [its] application would contravene an overriding public policy". Tipler v. E.I. du Pont de Nemours & Co., 443 F.2d 125, 128 (6th Cir. 1971). Accord, Brown v. Felsen, 442 U.S. 127, 132 (1979); 1B Moore's Federal Practice ¶ 0.405 at 783-791 (1974). Title VII implements just the sort of "overriding public policy" that limits the application of res judicata. Cf. Occidental Life Ins. Co. v. EEOC, 432 U.S. 355, 367 (1977). Indeed, Alexander v. Gardner-Denver Co., supra, is itself the best example of how the express mandates of Title VII override otherwise clear Federal policies barring relitigation of claims. There, this Court held that an employee's submission of a discrimination claim to arbitration under a labor contract did not preclude a Title VII action based on the identical facts. This Court pointed out that Title VII grants "a statutory right independent of the arbitration process", id. at 54, and therefore gives the employee what is, in effect, an additional right to a hearing. If the strong Federal policy favoring final arbitration of labor

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City of Dubuque, 1 Wall. (68 U.S.) 175, 206 (1863). The guiding principle "is to avoid unfairness to parties who may have acted in reliance on the old rule". Dasho v. Susquehanna Corp., 461 F.2d 11, 921 (7th Cir.) (Stevens, J.), cert. denied, 408 U.S. 925 (1972). See Chevron Oil Co. v. Huson, supra.

Notwithstanding these principles, the court of appeals applied Sinicropi retroactively here. 623 F.2d at 788, A. 06. Under all of the circumstances, the "plainest principles of justice" dictate a contrary result. To "avoid unfairness" to petitioner, who was, in effect, relying on "the old rule", Sinicropi should not be applied in this case. For this reason, the retroactivity issue has been raised as the second question presented by this petition, although it need not be reached, of course, if the first question is resolved in petitioner's favor.

disputes was insufficient to outweigh the policy of Title VII mandating a de novo Federal hearing in Alexander, that same Title VII policy must require a de novo Federal hearing in this case, notwithstanding petitioner's resort to state antidiscrimination procedures.

* * *

It is clear that the Sinicropi decision--without argument or discussion of the issue--mistakenly equated Title VII and section 1981 for res judicata purposes. In doing so, it ignored major differences in the legislative history and structure of the two statutes, as well as unanimous decisions of this Court. For these reasons, as noted above, other circuit courts have without hesitation refused to follow Sinicropi.

The Third Circuit in Smouse v. General Electric Co., supra, stated unequivocally that

> "[G]iven our analysis of Title VII and its objective, we cannot agree that a state determination at any stage is an absolute bar to a Title VII action. To the extent that Sinicropi's reasoning may be inconsistent with our own, we decline to adopt it." 626 F.2d at 336.

In Gunther v. Iowa State Men's Reformatory, supra, the Eighth Circuit, in its discussion of Sinicropi, stated that

> "[T]here are several bases to distinguishing between section 1981 and Title VII with regard to the application of res judicata. . . .[W]e agree with these courts [that declined to extend Mitchell to Title VII actions] that the unique statutory scheme of title VII supports the proposition that res judicata and collateral estoppel should not be applied". 612 F.2d at 1084, n.6.

4. HARMFUL IMPACT ON THE JUDICIAL SYSTEM

As the EEOC and both district court opinions recognized, if the decision below stands, no well-informed litigant will appeal NYHRD determinations to the Appellate

Division.* This would thwart the intent of Congress in enacting Title VII to give states the opportunity to remedy employment discrimination claims before the Federal system acts, and will cause two unfortunate results. First, the Federal court docket will be burdened with de novo hearings of all cases that are now disposed of by the state courts. Their numbers could well exceed the number of Federal cases that can be dismissed on res judicata grounds under Sinicropi, as plaintiffs quickly learn to avoid state appeals. This Court specifically addressed this policy issue in Alexander, concluding that "the possibility of voluntary compliance or settlement of Title VII claims would . . . be reduced [by giving arbitral decisions res judicata effect], and the result could well be more litigation, not less". 415 U.S. at 59.

The second result of Sinicropi will be a deterioration of the state administrative process. Since plaintiffs who wish to preserve Federal hearing rights will no longer appeal to the state courts, those courts will have less opportunity to oversee state administrative agencies. The resulting decline in the quality of state agency process is hardly consistent with notions of comity and federalism. See Kremer v. Chemical Construction Corp., supra, 477 F. Supp. at 592-593, A. 21-23.

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* See EEOC Amicus Brief at 6, 14-15, A. 53, 61-62; 477 F. Supp. at 592-594, A. 22-25; 464 F. Supp. at 475, A. 37-38.

CONCLUSION

The decision below is inconsistent with the purpose and structure of Title VII, with this Court's decisions and with the decisions of other courts of appeals. The petition for a writ of certiorari should be granted and the judgment reversed.

Dated: January 13, 1981

Respectfully submitted,

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APPENDIX

Kremer v. Chemical Construction Corp.,

623 F.2d 786 (2d Cir. 1980)

Rubin Kremer, Plaintiff-Appellant,
v.
Chemical Construction Corporation,
Defendant-Appellee.

No. 773, Docket 79-7748.

United States Court of Appeals,
Second Circuit.

Argued March 12, 1980.

Decided June 2, 1980.

Before LUMBARD, FRIENDLY and MESKILL, Circuit Judges.

FRIENDLY, Circuit Judge:

Plaintiff Rubin Kremer was employed as an engineer by defendant Chemical Construction Corporation (Chemico). He was laid off, along with a number of other employees, on August 1, 1975. Some of these employees were later rehired but Kremer was not, despite several applications. He claims that the termination and failure to rehire were due to his being of the Jewish faith; Chemico asserts it was due to legitimate business reasons.

Mr. Kremer filed a discrimination charge with the Equal Employment Opportunity Commission (EEOC) under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(b), on May 6, 1976. The EEOC, as required by 42 U.S.C. § 2000e-5(c), referred his complaint to the New York State Division of Human Rights (NYHRD). NYHRD conducted an investigation

which included examination of documents submitted by Chemico and three interviews with Mr. Kremer. On March 4, 1977, he requested the EEOC to undertake an investigation in light of the lack of progress by NYHRD. On April 28, 1977, NYHRD issued a Determination After Investigation which stated there was no probable cause to believe that Chemico had engaged in the discriminatory practice charged. Mr. Kremer appealed to the Appeal Board pursuant to N.Y. Executive Law § 297-a on both substantive and procedural grounds, and argued his case both orally and in writing. The Appeal Board affirmed the determination of the Division. Attached to the order of the Appeal Board was a notice that any complainant, respondent or other person aggrieved by the order might obtain judicial review by filing a proceeding in the appropriate Appellate Division within 30 days of service of the order.

Mr. Kremer again brought his complaint to the attention of the EEOC by letter dated December 4, 1977, and also filed, on December 6, 1977, a petition with the Appellate Division of the Supreme Court of New York for the First Department pursuant to § 298 of the N.Y. Human Rights Law and CPLR Article 78 to set aside the adverse determination of the NYHRD. On February 27, 1978, the Appellate Division unanimously ordered that the determination of the Appeal Board be confirmed. Mr. Kremer did not endeavor to obtain review by the New York Court of Appeals. The District Director of the EEOC on May 11, 1978, made a determination concluding that there was not reasonable cause to believe that the charge of discrimination was true and issued a notice of right to sue in a United States district court. After the District Direc-

tor, having reviewed the case file and spoken with the investigator, denied a request for reconsideration, Mr. Kremer brought this Title VII action in the District Court for the Southern District of New York.

Chemico moved for dismissal of the complaint or summary judgment on the basis that the determination of the Appellate Division constituted a bar under the reasoning of our decision in Mitchell v. National Broadcasting Co., 553 F.2d 265 (2 Cir. 1977), where a divided panel held that a similar judgment operated as res judicata with respect to an action under 42 U.S.C. § 1981. Judge Pierce denied the motion in an opinion, 464 F. Supp. 468 (S.D.N.Y. 1978), which sought to distinguish the res judicata effect of a state court determination on an action under Title VII from that upon an action under 42 U.S.C. § 1981, a point left open in the majority opinion in Mitchell, 553 F.2d at 275 n.13. Later, after our decision in Sinicropi v. Nassau County, 2 Cir., 601 F.2d 60, cert. denied, 444 U.S. 983, 100 S.Ct. 488, 62 L.Ed.2d 411 (1979), which applied the reasoning of Mitchell to a claim under Title VII, Chemico renewed its motion to dismiss or for summary judgment. Judge Sofaer, to whom the case had been transferred, felt constrained to grant the motion but delivered a lengthy opinion, 477 F. Supp. 587 (S.D.N.Y. 1979), devoted mainly to an endeavor to show that the Mitchell and Sinicropi decisions were in error.

Appealing from the judgment of dismissal, Mr. Kremer, now represented by counsel, seeks reversal on two grounds:

One is that Sinicropi was wrongly decided; the other is that it should not be applied "retroactively."[1]

This panel cannot properly entertain the claim that Sinicropi was wrongly decided. In the absence of any decisions by the Supreme Court or our own court in the brief interval since Sinicropi was decided that would cast doubt on its viability, and none has been called to our attention, a panel of this court will not overturn a recent decision of another panel, rendered after full consideration of the very point at issue. This is something to be done, if at all, only by the full court sitting en banc. See United States v. Fatico, 603 F.2d 1053, 1058 (2 Cir. 1979), cert. denied, U.S. , 100 S.Ct. 1018, 62 L.Ed.2d 755 (1980); Ingram v. Kumar, 585 F.2d 566, 568 (2 Cir. 1978), cert. denied, 440 U.S. 940, 99 S.Ct. 1289, 59 L.Ed.2d 499 (1979); In re Jaylaw Drug, Inc., 621 F.2d 524, 527 (2 Cir. 1980); contrast United States v. Taylor, 464 F.2d 240, 242-44 (2 Cir. 1972) (1944 decision which was no longer being followed in practice; overruling opinion circulated to and approved by all judges in active service); Benjamins v. British European Airways,

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[1] While neither Judge Sofaer's opinion nor the brief of counsel for Mr. Kremer suggested that Sinicropi was distinguishable, at the oral argument there was some discussion of a possible distinction on the basis that Mr. Kremer had gone initially to the EEOC and was sent to the New York administrative agency by it pursuant to the deferral provision of 42 U.S.C. § 2000e-5(c), whereas Ms. Sinicropi began her proceeding in the NYHRD. Although this may make Mr. Kremer's case somewhat more attractive, we do not think the distinction has legal significance. Ultimately both claimants brought suit in a federal district court and the question is the binding effect of a determination by the Appellate Division in judicial proceedings initiated by them. If Ms. Sinicropi had gone first to the EEOC, she would have been sent to the New York administrative agency, exactly as was Mr. Kremer.

572 F.2d 913, 916-17 (2 Cir. 1978), cert. denied, 439 U.S. 1114, 99 S.Ct. 1016, 59 L.Ed.2d 72 (1979) (reconsideration by panel of two cases decided in the 1950's which appeared inconsistent with more recent decisions on a related subject); Boothe v. Hammock, 605 F.2d 661, 664 (2 Cir. 1979) (intervening Supreme Court decision).[2] We can be confident that the full court will have an opportunity to overrule Sinicropi if it wishes since counsel for Mr. Kremer advised us that he would seek rehearing en banc if we should affirm.[3]

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[2] This is the rule in other circuits as well. See, e.g., United States v. Caldwell, 543 F.2d 1333, 1369 (D.C. Cir.), cert. denied, 423 U.S. 1087, 96 S.Ct. 877, 47 L.Ed.2d 97 (1976) (on petition for rehearing); United States v. Inmon, 594 F.2d 352, 354 (3 Cir.), cert. denied, 444 U.S. 859, 100 S.Ct. 121, 62 L.Ed.2d 78 (1979); United States v. Lewis, 475 F.2d 571, 574 (5 Cir. 1973); Timmreck v. United States, 577 F.2d 372, 376 n.15 (6 Cir. 1978), rev'd on other grounds, 441 U.S. 780, 99 S.Ct. 2085, 60 L.Ed.2d 634 (1979); cf. Rules of the United States Court of Appeals for the Seventh Circuit, Rule 16 ("A proposed opinion approved by a panel of this court adopting a position which would overrule a prior decision of this court . . . shall not be published unless it is first circulated among the active members of this court and a majority of them do not vote to rehear in banc the issue of whether the position should be adopted."). The only contrary expression we have found is in Speigner v. Jago, 603 F.2d 1208, 1212 n.4 (6 Cir. 1979), cert. denied, U.S. , 100 S.Ct. 1023, 62 L.Ed.2d 758 (1980) ("it would be a waste of judicial time and resources to automatically require an en banc hearing each and every time this Court overrules or modifies one of its previous decisions"). As noted, en banc rehearing is not required "each and every time" a previous panel decision is modified, but only when the basis for overruling the previous decision is simply that it is wrong although nothing new has occurred to show it to be so. The views expressed in Speigner were those of Judge Peck alone, since Chief Judge Edwards concurred separately, not finding it necessary to overrule the precedent in question, id. at 1215 n.1, and Judge Weick dissented, partly on the ground that "[n]o panel of this Court has the power or right to overrule the decision of another panel." Id. at 1217. For an illustration of the difficulties that can arise from panels taking divergent courses, see Davis v. United States, 417 U.S. 333, 94 S.Ct. 2298, 41 L.Ed.2d 109 (1974).

[3] Rehearing en banc was denied in Sinicropi itself when no active judge or judge who was a member of the panel requested that a vote be taken pursuant to a petition for rehearing en banc.

We likewise reject the alternative argument that the Sinicropi decision should not be applied to this case because Mr. Kremer brought his proceeding in the Appellate Division a year and a half before it was rendered. "The general rule of long standing is that judicial precedents normally have retroactive as well as prospective effect." National Association of Broadcasters v. FCC, 554 F.2d 1118, 1130 (D.C. Cir. 1976). To this general rule the Supreme Court has announced an exception which was defined, with respect to civil cases, in Chevron Oil Co. v. Huson, 404 U.S. 97, 106-07, 92 S.Ct. 349, 355, 30 L.Ed.2d 296 (1971):

> In our cases dealing with the nonretroactivity question, we have generally considered three separate factors. First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, see, e.g., Hanover Shoe Inc. v. United Shoe Machinery Corp., supra, [392 U.S. 481] at 496, [88 S.Ct. 2224, 20 L.Ed.2d 1231] or by deciding an issue of first impression whose resolution was not clearly foreshadowed, see, e.g., Allen v. State Board of Elections, supra, [393 U.S. 544] at 572 [89 S.Ct. 817, 22 L.Ed.2d 1]. Second, it has been stressed that "we must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purposes and effect, and whether retrospective operation will further or retard its operation." Linkletter v. Walker, supra, [381 U.S. 618] at 629 [85 S.Ct. 1731, 14 L.Ed.2d 601]. Finally, we have weighed the inequity imposed by retroactive application, for "[w]here a decision of this Court

could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity." Cipriano v. City of Houma, supra, [395 U.S. 701] at 706 [89 S.Ct. 1897, 23 L.Ed.2d 647].

Although the Court was not obliged to decide in Chevron whether it was necessary to pass each of these hurdles to secure a denial of retrospectivity, since it found all the required factors were present, the courts of appeals have held that unless the first factor is satisfied, there is no occasion to consider the other two. United States v. Bowen, 500 F.2d 960, 975 & n.1 (9 Cir. 1974), aff'd, 422 U.S. 916, 95 S.Ct. 2569, 45 L.Ed.2d 641 (1975); Ferguson v. United States, 513 F.2d 1011, 1012 (2 Cir. 1973); Jordan v. Weaver, 472 F.2d 985, 996 (7 Cir. 1973), rev'd on other grounds sub nom. Edelman v. Jordan, 415 U.S. 651, 658-59 n.7, 94 S.Ct. 1347, 1353-54, 39 L.Ed.2d 662 (1974). This finds support not only in the language of the Chevron opinion itself, 404 U.S. at 106, 92 S.Ct. at 355 ("the decision to be applied nonretroactively must establish a new principle of law") (emphasis supplied), see Jordan v. Weaver, supra, 472 F.2d at 996, but also by other Supreme Court decisions analyzing questions of retrospectivity. See, e.g., Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481, 499, 88 S.Ct. 2224, 2234, 20 L.Ed.2d 1231 (1968) (decisions applied retrospectively because they "did not constitute a sharp break in the line of earlier authority or an avulsive change which caused the current of the law thereafter to flow between new banks"); Desist v. United States, 394 U.S. 244, 248, 89 S.Ct. 1030,

1032, 22 L.Ed.2d 248 (1969) (retrospectivity analysis appropriate where decision was "a clear break with the past"); Gosa v. Mayden, 413 U.S. 665, 673, 93 S.Ct. 2926, 2932, 37 L.Ed.2d 873 (1973) (same for "a decisional change in attitude that had prevailed for many decades"). Six months after writing Chevron, Justice Stewart wrote that "[a]n issue of the 'retroactivity' of a decision of this Court is not even presented unless the decision in question marks a sharp break in the web of the law." Milton v. Wainwright, 407 U.S. 371, 381 n.2, 92 S.Ct. 2174, 2180, 33 L.Ed.2d 1 (1972) (Stewart, J., dissenting; the majority did not reach the issue). See generally Beytagh, Ten Years of Non-Retroactivity: A Critique and A Proposal, 61 Va. L. Rev. 1557, 1582-83, 1608-09 (1975). Any broader reading of Chevron would require courts to engage in the balancing process demanded by the second and third factors whenever a recognized legal principle, here res judicata, had been applied--or not applied--to a situation not precisely covered by previous decisions.

Under the first Chevron test it is not sufficient that the decision determines a point of law on which the court had not previously passed. In order to invoke nonretroactivity the decision must have established "a new principle of law, either by overruling clear past precedent on which litigants may have relied, . . . or by deciding an issue of first impression whose resolution was not clearly foreshadowed." Chevron, supra, 404 U.S. at 106-07, 92 S.Ct. at 355. Sinicropi certainly did not overrule a "clear past precedent on which litigants may have relied." Prior to Mitchell, as shown by Judge Feinberg's dissent, 553 F.2d at

277-80, the application of state decisions to actions under various federal civil rights statutes as res judicata in general and under 28 U.S.C. § 1738[4] in particular was an area of considerable turmoil. The specific question decided in Sinicropi was expressly left open in Mitchell, supra, 553 F.2d at 275 n.13, which was decided some time before Mr. Kremer took his case to the Appellate Division. There was thus nothing on which Mr. Kremer could have relied since Mitchell "clearly foreshadowed" Sinicropi. While, as stated, the Mitchell majority left the point open, its reasoning, 553 F.2d at 275-76, dictated the Sinicropi result. See Shea v. City of St. Paul, 601 F.2d 345, 351 (8 Cir. 1979). Judge Feinberg made this a principal ground of his Mitchell dissent, 553 F.2d at 278, and joined in the per curiam panel opinion in Sinicropi which stated "we all believe that the reasoning of that [the Mitchell] decision controls this one." Against all this it is of no moment that at the time Mr. Kremer resorted to the Appellate Division there were five

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[4] This reads:

> The Acts of the legislature of any State, Territory or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.
>
> The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.
>
> Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

district court decisions,[5] two in this circuit, which held that an adverse state judicial decision in a proceeding initiated by the plaintiff did not bar a Title VII action. See Cates v. Trans World Airlines, Inc., 561 F.2d 1064, 1072-74 (2 Cir. 1974).

We add that if it were necessary to consider the second and third Chevron factors, our conclusion would not be different. Retrospective application of Sinicropi would surely further rather than retard the operation of a principle designed to prevent relitigation in the federal courts of issues already determined by the state courts. The third factor likewise is not met. A litigant represented by counsel would have known, even before Mitchell and surely thereafter, that going from the state administrative agency to the state courts involved serious risk of the application of res judicata if the state court decision was adverse. No one contends that Mr. Kremer, who was acting pro se, had any knowledge of the district court decisions, or, for that matter, of Mitchell.[6] It cannot therefore be said that liti-

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[5] Young v. South Side Packing Co., 369 F. Supp. 59 (E.D. Wis. 1973); Benneci v. Dep't of Labor, 388 F. Supp. 1080 (S.D.N.Y. 1975); Beck v. Mather, 417 F. Supp. 648 (W.D. Va. 1976); Al-Hamdani v. State University of New York, 438 F. Supp. 299 (W.D.N.Y. 1977); Nickel v. Highway Industries, Inc., 441 F. Supp. 477 (W.D. Wis. 1977). Only the latest two of these decisions, in addition to Judge Pierce's opinion in this case, supra, 464 F. Supp. 468, were decided after Mitchell.

[6] Some point is made that the notice given to Mr. Kremer by the Appeal Board of his right to obtain review in the Appellate Division may have misled him as to the consequences of failure in that court on a Title VII action. The notice was a commendable effort to inform Mr. Kremer of his rights under New York law; the Appeal Board was under no obligation to go further.

gants in Mr. Kremer's position had any justifiable reliance interest which it would be inequitable to violate by retrospective application of Sinicropi. See Dasho v. Susquehanna Corp., 461 F.2d 11, 21 (7 Cir.), cert. denied, 408 U.S. 925, 92 S.Ct. 2496, 33 L.Ed.2d 336 (1972) (guiding principle is "to avoid unfairness to parties who may have acted in reliance on the old rule").

The judgment is affirmed.

Kremer v. Chemical Construction Corp.,

477 F. Supp. 587 (S.D.N.Y. 1979) (Sofaer, J.)

Rubin KREMER, Plaintiff,

v.

CHEMICAL CONSTRUCTION CORP., Defendant.

No. 78 Civ. 3182.

United States District Court, S. D. New York.

Sept. 20, 1979.

As Amended Oct. 2, 1979.

OPINION

SOFAER, District Judge:

This is an action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. Plaintiff Kremer claims he was discharged and has not been rehired by defendant Chemical Construction Corp. (Chemico) because of his religion (Jewish) and national origin. He filed a discrimination charge with the Equal Employment Opportunity Commission (EEOC) on May 6, 1976. EEOC referred the matter to the New York State Division of Human Rights (NYHRD), as mandated. 42 U.S.C. § 2000e-5(c). NYHRD concluded that plaintiff had failed to establish probable cause to believe that Chemico had engaged "in the unlawful discrimination practice complained of," and made findings that

plaintiff had not been rehired for lawful reasons.[1] No express findings were made with respect to Kremer's initial discharge.[2] The papers filed by Kremer indicate, however, that the evidence of discrimination on rehiring is more substantial than the evidence advanced on the illegality of the initial discharge. The NYHRD seems therefore to have impliedly rejected plaintiff's additional claims. On November 25, 1977, the NYHRD's determination was upheld by its Appeal Board as "not arbitrary, capricious or an abuse of discretion."

Plaintiff then appealed to the Appellate Division, First Department, for a judgment pursuant to § 298 of the Human Rights Law and pursuant to CPLR Article 78. He offered all the evidence and arguments there that he has most recently advanced in this court. The decision was unanimously "confirmed" by five Justices on February 27, 1978. Plaintiff again petitioned the EEOC for relief. On May 11, 1978, the EEOC found no probable cause to believe

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[1] The determination recited:

> The record shows that this complainant was not rehired by the respondent employer because one employee with greater seniority was chosen.
>
> The other person that was rehired, [sic] filled a lesser position than that held by complainant.
>
> Complainant's creed, or age, was not a factor in these selections.
>
> The complaint is therefore ordered dismissed, and the file is closed.

"Determination after Investigation," NYHRD, April 28, 1977, Exhibit C, Defendant's Motion to Dismiss, Sept. 5, 1978.

[2] Id., Exhibit C.

plaintiff's claims, but it confirmed (on the usual printed form) a right to "pursue this matter further, if so desired, by filing a private action in Federal District Court within 90 days."[3] This action followed.

Chemico has argued from the outset of this litigation that plaintiff's Title VII claims are barred by res judicata. Defendant formally moved for dismissal on September 5, 1978, basing its argument primarily on Mitchell v. National Broadcasting Co., 553 F.2d 265 (2d Cir. 1977). Mitchell was an action under 42 U.S.C. § 1981 by a black woman claiming racial discrimination by her employer. Like Kremer, she was denied relief by the NYHRD, unsuccessfully sought review by its Appeal Board, and then applied to the Appellate Division, First Department, which unanimously confirmed. Mitchell thereafter applied to the EEOC. After the EEOC found no probable cause, she sued in federal court under 42 U.S.C. § 1981. The only significant difference, therefore, between Mitchell and the present case is that plaintiff Kremer sues in the federal courts under Title VII, whereas Mitchell sued under § 1981.

The Second Circuit held in Mitchell that a federal action under § 1981 was barred under principles of res judicata. In so holding, the court found it necessary to distinguish its earlier decision in Voutsis v. Union Carbide Corp., 452 F.2d 889 (2d Cir. 1971), cert. denied, 406 U.S. 918, 92 S.Ct. 1768, 32 L.Ed.2d 117 (1972), which held that resort to a state agency to test a racial discrimination claim does not bar a subsequent federal suit

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[3] Id., Exhibit H.

under Title VII.[4] Because the plaintiff in Mitchell had gone one step beyond the state agency level by seeking limited review in the state courts by way of an Article 78 proceeding, a majority of the Second Circuit panel concluded that the state decision should be accorded the same res judicata effect it would have in the New York State courts.[5]

The plaintiff in Mitchell, though suing under § 1981, argued that to apply res judicata to her case would conflict with the legislative scheme of Title VII. But the court disagreed. The federal interest in encouraging deferral of civil rights claims to state adjudication applied only, the court found, to state agencies where conciliation of civil rights claims is attempted. "Once review of a state agency determination is sought in the state courts, however, these considerations disappear." 553 F.2d at 275. This result, the court stated, allows state agencies to apply their expertise in discrimination claims and at the same time affords a federal remedy to claimants who choose to sue in the federal courts rather than seek review in the state courts. Id. at 265.

Judge Feinberg dissented in Mitchell. He concluded that if res judicata applied in an action under 42 U.S.C. § 1981, it should also apply to a claim under Title VII, a result he found unacceptable. He reasoned

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[4] In Alexander v. Gardner-Denver Co., 415 U.S. 36, 94 S.Ct. 1011, 39 L.Ed.2d 147 (1974), the Supreme Court cited the Voutsis decision with approval, noting that "[m]ost courts have recognized that the doctrine of election of remedies does not apply to suits under Title VII", at 49 n. 11, 94 S.Ct. at 1020. See also Cooper v. Philip Morris, Inc., 464 F.2d 9 (6th Cir. 1972).

[5] Because Mitchell sought relief in the federal court on the same grounds as in the state court, the court reasoned that she had had her "day in court." The fact that no opportunity for a formal evidentiary hearing had been afforded did not, in the court's view, preclude application of res judicata so long as there was an identity of issues and the plaintiff had had the right to appear and an opportunity to be heard. 553 F.2d at 271.

that, since Congress had provided for a de novo hearing of all Title VII cases in the federal courts after both state and federal agency determinations, it made no sense to deprive a complainant of de novo review because he or she pursued an additional, limited review in the state courts. He noted that Congress had provided in civil rights cases for considerable duplication and overlapping of remedies, and that this legislative purpose should not be overridden by judicial resort to the normal but inapposite policy against repetitious litigation. Id. at 277-80; see 28 U.S.C. § 1738.

Despite Mitchell, defendant's motion to dismiss in this case was denied by Judge Lawrence W. Pierce on December 7, 1978.[6] Judge Pierce essentially adopted Judge Feinberg's reasoning in Mitchell, but concluded that the specific statutory grant of de novo federal review in Title VII justified distinguishing, for res judicata purposes, cases under Title VII from cases under the other civil rights statutes. He agreed also with Judge Whitman Knapp's opinion in Benneci v. Department of Labor, 388 F.Supp. 1080 (S.D.N.Y.1975). To apply res judicata to Title VII cases, Judges Pierce and Knapp concluded, would defeat the general purposes of the statutory scheme as construed by a unanimous Supreme Court in Alexander v. Gardner-Denver Co., 415 U.S. 36, 94 S.Ct. 1011, 39 L.Ed.2d 147 (1974). "Such a holding would impliedly restrict the

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[6] Further indication of the Second Circuit's attitude on repetitious litigation was provided by the intervening decision in Winters v. Lavine, 574 F.2d 46 (2d Cir. 1978), applying collateral estoppel in an action under 42 U.S.C. § 1983.

express provision for a second independent hearing to those instances where state proceedings had been terminated without state court review. There being no limitation of this nature on the availability of a de novo hearing imposed by Congress, the insertion of a qualification by judicial fiat is unwarranted." Kremer v. Chemical Construction Co., 464 F.Supp. 468, 473 (S.D.N.Y.1978).

On June 12, 1978, however, the Second Circuit extended the Mitchell rule to Title VII cases. In a per curiam opinion, it held that res judicata would bar a Title VII claim where the plaintiff had previously sought state court review on the same question presented to the federal courts. The panel saw "no reason to distinguish between Section 1981 and Title VII for res judicata purposes." Without discussion of the de novo review requirement of Title VII, Mitchell was deemed to control. "The crucial factor is that appellant chose to submit her case to the state courts for review and she cannot now relitigate the same issues in federal court." Sinicropi v. Nassau County, 601 F.2d 60 at 62 (2d Cir. 1979). (Emphasis in original.) Judge Feinberg, who dissented in Mitchell, agreed its reasoning required dismissal of Title VII cases, as he had predicted.

Sinicropi permits no choice but to dismiss plaintiff's complaint in this case on grounds of res judicata. Plaintiff urges what he regards as distinguishing features: perfunctory treatment by the NYHRD and an order by the Appellate Division that misleads by reciting that plaintiff appeared and argued in his behalf. These deficiencies, however, are less substantial than--though

similar to--the deficiencies raised by the plaintiff in Mitchell. See 553 F.2d at 268 (lack of witnesses, no cross-examination, no counsel). Nor is it significant that the NYHRD's opinion expressly refers only to the plaintiff's claim based on defendant's failure to rehire him; the papers indicate that both the agency and the state court were presented with all aspects of plaintiff's claim of religious discrimination--identical to the claim presented in this court--and they denied relief.

To submit to Mitchell and Sinicropi, however, is not to agree with them. The Mitchell majority's conclusion that Title VII's de novo review is satisfied by a combination of an agency finding of no probable cause coupled with Article 78 review seems fanciful. No amount of judicial explication can alter the reality that a litigant who pursues his civil rights claim in a state court with limited powers of review loses his statutory right to full review in the federal courts. This disparity in remedial opportunity is merely obfuscated by the assertion that agency consideration of probable cause coupled with limited Article 78 review is equivalent to a summary judgment proceeding in federal court and thus satisfies the de novo review requirement. It is well settled that in considering a Title VII claim a federal district court is not bound by administrative findings of fact. Chandler v. Roudebush, 425 U.S. 840, 844-45, 96 S.Ct. 1949, 48 L.Ed.2d 416 (1976). A Title VII trial may therefore encompass anything reasonably within the scope of an EEOC investigation. See Comment, T'was a Nibble Not a Bite: Res Judicata and Section 1981--Mitchell v. National

Broadcasting Co., 53 N.Y.U.L.Rev. 187, 204-05 (1978). Whether the district court decides the claim on a motion for summary judgment or after a full trial, it is entitled to request additional affidavits and evidence and, if necessary, to hold an evidentiary hearing. See generally Wright & Miller, Federal Practice and Procedure: Civil § 2721 (1973). By contrast, the New York Appellate Division, like most appellate courts, is limited to the record of facts gathered and evidence presented in the agency proceedings. Comment, State Appellate Court Judgment on Employment Discrimination is Res Judicata in Subsequent Federal Action Under Section 1981 of the Civil Rights Act of 1866, 62 Minn.L.Rev. 987, 1006 (1978). As a result, the appellate court determination is subject to all the procedural infirmities of the administrative proceeding.

Even if state agency and appellate court review were considered sufficiently analogous to federal summary judgment in the abstract, res judicata would still appear an inappropriate mechanism to bar Title VII claims in the federal courts. As the Second Circuit stated in Voutsis, supra, "[a] federal claim allows the district court to conduct a 'full scale inquiry into the charged unlawful motivation in employment practices'", 452 F.2d at 893, quoting Bowe v. Colgate-Palmolive Co., 416 F.2d 711, 715 (7th Cir. 1969). Such a full scale inquiry will often call for a trial on the merits, including independent fact-finding by the federal court. The Mitchell majority correctly argued, of course, that a federal court is empowered to use a summary judgment procedure in all cases where no genuine issue of material fact is presented;

in such cases the issues considered in the federal review would be quite similar to the issues considered when a state court "confirms" as reasonable an agency's dismissal for lack of probable cause. But there is a critical difference between the authority of the New York and federal courts in dealing with Title VII issues. A federal court is permitted to make a summary judgment disposition of an employment discrimination case. By contrast, the New York Appellate Division in an Article 78 proceeding is restricted to using a proceeding similar to summary judgment; it has no authority to determine whether summary judgment is, in a given case, preferable to a full judicial trial on the merits.[7] For this reason, the issues presented

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[7] See generally Comment, Civil Rights--Civil Procedure: State Appellate Court Judgment on Employment Discrimination is Res Judicata in Subsequent Federal Action Under Section 1981 of the Civil Rights Act of 1866, supra, at 988 nn. 5 & 6. The Appeal Board reviews dismissals for lack of probable cause only to determine whether the action of the NYHRD was "arbitrary and capricious or characterized by an abuse of discretion or a clearly unwarranted exercise of discretion." Mayo v. Hopeman Lumber & Mfg. Co., 33 A.D.2d 310, 313, 307 N.Y.S.2d 691, 694, appeal dismissed, 26 N.Y.2d 962, 311 N.Y.S.2d 5, 259 N.E.2d 477 (1970). Even if the Board determines that there is a genuine factual dispute over a key issue, it may not reverse the NYHRD's dismissal for lack of probable cause. See Merrill Lynch, Pierce, Fenner & Smith, Inc. v. State Div. of Human Rights, 48 A.D.2d 391, 370 N.Y.S.2d 96 (1975) (per curiam). Nor is it empowered to find new facts. See State Div. of Human Rights v. Columbia Univ., 39 N.Y.2d 612, 616, 385 N.Y.S.2d 19, 21, 350 N.E.2d 396, 398 (1976), cert. denied, 429 U.S. 1096, 97 S.Ct. 1112, 51 L.Ed.2d 543 (1977).

The Appellate Division's scope of review in an Article 78 proceeding has been held to be no broader than that of the Appeal Board. See Mize v. State Div. of Human Rights, 33 N.Y.2d 53, 57, 349 N.Y.S.2d 364, 367-68, 304 N.E.2d 231, 233 (1973). Thus, in reviewing the state agency determinations, it seems that the Appellate Division can at most reverse and remand for a hearing or further investigation by the agency. See Mitchell, supra, 553 F.2d at 272 n. 9, citing Mayo v. Hopeman Lumber & Mfg. Co., supra.

In justifying application of res judicata in Mitchell, the majority apparently relied on the fact that Second Circuit courts have on occasion given res judicata effect to Article 78 judgments. 553 F.2d at 272 n. 9. None of the cases cited by the majority, however, involved the resolution of employment discrimination or similar claims where Congress expressly provided for de novo federal court review.

before the state court in an Article 78 proceeding and those before the federal court under Title VII are necessarily dissimilar, thus making the application of res judicata inappropriate. Given the express mandate in Title VII for federal de novo review, the federal court would appear obliged to determine independently the nature and extent of review necessary to protect a claimant from employment discrimination. Mitchell and Sinicropi foreclose the federal courts from considering this important question.[8]

A primary concern of the Mitchell majority was the need to enhance comity between the state and federal courts. Yet, as the Mitchell majority concedes, comity in our federal system must always begin with a proper implementation of our national legislature's will. Otherwise, the concept might be used to create a preference for adjudicating at least some types of federal claims in state rather than federal court. Where Congress has "long evinced a general intent to accord parallel or overlapping remedies against discrimination," Alexander v. Gardner-Denver Co., supra, 415 U.S. at 47, 94 S.Ct. at 1019, a preference for state resolution of such claims seems especially inappropriate. Furthermore, comity has generally been understood

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[8] This court concedes that it may not always be inappropriate for a federal court to give res judicata effect to a state court's disposition of an employment discrimination claim. As two commentators have persuasively argued, res judicata effect might properly be accorded when the state proceedings included a trial on the merits, or at least involved summary disposition where there was a possibility of full trial on the merits. Comment, Civil Rights--Civil Procedure: State Appellate Court Judgment on Employment Discrimination is Res Judicata in Subsequent Federal Action Under Section 1981 of the Civil Rights Act of 1866, supra, at 1012; Comment, T'was a Nibble Not a Bite: Res Judicata and Section 1981, supra, at 214.

to require deference to state decisions based on the same scope of review applied in comparable federal proceedings. It seems a strange version of comity to require a federal court to relinquish an obligation to grant de novo review on the ground that a state court has granted limited review of a state agency decision. One wonders, moreover, why comity will be served if, as seems likely, individuals with civil rights claims will strive to avoid the state courts in order to preserve their right to a federal forum.

The Mitchell majority also wrote of the "interests of judicial husbandry," and "the equity of protecting opposing parties . . from vexatious duplicative litigation," 553 F.2d at 276-277, quoting from Thistlewaite v. City of New York, 362 F.Supp. 88, 92 (S.D.N.Y.1973), aff'd, 497 F.2d 339 (2d Cir.), cert. denied, 419 U.S. 1093, 95 S.Ct. 686, 42 L.Ed.2d 686 (1974). Even assuming an adequate basis exists for judicially revising the apparent legislative judgment as to where the balance should be struck on these interests, do considerations of judicial administration and equity truly support the application of res judicata in Title VII cases?

Title VII plaintiffs will still initially seek relief before the NYHRD because the federal statute requires them to do so. Some will still seek review in the state courts on state law grounds, carefully avoiding any mention of their federal claims even though they are before a tribunal competent to review those claims. Most will avoid the state courts entirely, thus encouraging further deterioration of the state agency process due to much less frequent state court supervision. Furthermore, by

discouraging state court review of agency decisions, Mitchell and Sinicropi may well serve to increase the number of discrimination cases brought in the federal courts. Those plaintiffs who, until Mitchell and Sinicropi, were satisfied with the handling of their claims by the state courts and sought no federal review will, after those decisions, pursue their claims in federal courts at the outset.[9] Federal courts who hear these claims will no longer have the benefit of state court decisions, which have often been of assistance.

As for the equitable consequences of Mitchell and Sinicropi, they may create far more unfairness than they avoid, and proper alternative means for avoiding vexatious, duplicative litigation seem available. First, it seems clear that many civil rights claimants have been misled by prior court decisions, such as Voutsis, into believing they could seek limited state court review without losing access to the federal courts. Indeed, in cases

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[9] Cf. Alexander v. Gardner-Denver Co., supra, where the Supreme Court expressed similar concerns in holding that federal courts should not give res judicata effect to state arbitration determinations. The Court noted that to hold otherwise

> might adversely affect the arbitration system as well as the enforcement scheme of Title VII. Fearing that the arbitral forum cannot adequately protect their rights under Title VII, some employees may elect to bypass arbitration and institute a lawsuit. The possibility of voluntary compliance or settlement of Title VII claims would thus be reduced, and the result could well be more litigation, not less. 415 U.S. at 59, 94 S.Ct. at 1025.

such as the present one, the state and federal agencies handling civil rights claims have uniformly assumed that federal review remained available under Title VII irrespective of prior proceedings. For example, after Mr. Kremer had gone to the state agency, sought state review, and then federal agency consideration, the EEOC issued a letter stating that he had a "right to sue" in federal court. There seems little equity in imposing a rule of forfeiture upon applicants such as Kremer under circumstances where even the expert agencies could not have anticipated one. Granted that the unfairness of applying res judicata to Title VII cases is lessened with respect to complainants who seek state court review after Sinicropi; yet the fact remains that the individuals who sought review in state court prior to Sinicropi have lost their right to federal court consideration of an important federal claim without notice or fault.[10]

The Mitchell and Sinicropi decisions will also have inequitable results in future cases. Undoubtedly some individuals will continue to seek review of their federal claims in state courts. These will generally be the uninformed parties who are commonly seen as pro se plaintiffs in civil rights cases. Whatever increase is attained in judicial efficiency through finalizing state court decisions is likely to be at the expense of these plaintiffs

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[10] The unfairness of applying Sinicropi to plaintiffs such as Kremer was brought home to this court when Mr. Kremer was told his complaint had to be dismissed. He was obviously shocked to discover that he had no right to federal review. He complained that he had gone through all the procedures he had been told to go through, but had never obtained a hearing on his claim.

who will not know they should avoid our sister courts. On the other hand, civil rights defendants will not really be spared vexatious, duplicative litigation by Mitchell and Sinicropi. Knowledgeable plaintiffs need dispense with only one of the several stages of litigation available to them, one which to defendants must be the least burdensome stage of all, i. e., a limited review in which the state agency joins the defendant in opposing the plaintiff's contentions.

Greater relief for vexed defendants in Title VII cases is certainly an objective the Circuit Court should strive to secure. Cases brought by individual plaintiffs seem particularly burdensome, and most often meritless. Devices are potentially available, however, that would be more effective in deterring vexatious suits and fairer to plaintiffs than applying the res judicata doctrine. Two particularly promising measures would be to encourage federal district judges to use their power to grant summary judgment on the merits, and to permit them greater authority in frivolous cases to grant costs and counsel fees against the losing plaintiff.

The right to a de novo review should not exempt civil rights claimants from the usual requisites of federal litigation, including the need to allege facts sufficient to create a genuine issue of fact as well as a legal theory upon which relief may be granted. We are perhaps too reluctant to give full weight at the pleading stage to the practical reality that, in light of the plaintiff's burden of proof, discrimination cases based essentially on the plaintiff's feelings or suspicions often fail to raise

issues of fact worth litigating.[11] Indeed, greater use of summary judgment in employment discrimination cases finds support in the Mitchell decision itself. If the court there was willing to give full faith and credit to a state procedure which merely resembles federal summary judgment, it should be even more prepared to affirm a federal district court's summary disposition of a Title VII claim, especially since the federal court is free to consider the propriety of a full trial on the merits.

We naturally resist imposing costs and fees on individuals who already carry with them, however unjustifiably in the law's eyes, a feeling of having been greatly wronged. Yet it is here that the courts must show courage and ingenuity. Instead of precluding suits under judicial doctrines such as res judicata, we should use statutorily granted powers to tax costs and fees in cases we have concluded are meritless. See 42 U.S.C. § 2000e-5(k). The Supreme Court recently confirmed the propriety of awarding attorney's fees to a Title VII defendant who prevails on the merits. Christianburg Garment Co. v. EEOC, 434 U.S. 412, 98 S.Ct. 694, 54 L.Ed.2d 648 (1978). Although the Court concluded that a more stringent standard should apply to prevailing defendants than would apply to prevailing plaintiffs, the standard articulated by the Court for prevailing defendants seeking attorney's fees is far less stringent than many lower federal courts had assumed. The Supreme Court stated: "[A] district court may in its discretion award attorney's fees to a prevailing defendant

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[11] One commentator persuasively argues that, where the moving party does not have the trial burden of proof, the summary judgment evidentiary standard should be relaxed. Louis, Federal Summary Judgment Doctrine: A Critical Analysis, 83 Yale L.J. 745 (1974).

in a Title VII case upon a finding that the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith." 434 U.S. at 421, 98 S.Ct. at 700. With this new standard, the assessment of attorney's fees is now available as a potentially effective device for protecting defendants from the burdens of meritless civil rights claims.

The motion to dismiss is granted, and the complaint is dismissed, without costs to either side.

SO ORDERED.

Kremer v. Chemical Construction Corp.,

464 F. Supp. 468 (S.D.N.Y. 1978) (Pierce, J.)

Rubin KREMER, Plaintiff,

v.

CHEMICAL CONSTRUCTION, CORP.,
Defendant.

No. 78 Civ. 3182

United States Distict Court,

S. D. New York.

Dec. 7, 1978.

OPINION AND ORDER

PIERCE, District Judge.

The plaintiff, Rubin Kremer, instituted this pro se action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. The plaintiff alleges that the defendant, Chemical Construction Corp. ("Chemico"), both discharged him and failed to rehire him because of his religion and national origin. The defendant has moved for dismissal under Fed. R. Civ. P. 12(b) or, alternatively, for summary judgment under Rule 56 on the ground of res judicata. For the reasons that follow, the Court finds that the plaintiff is entitled to a de novo hearing on the claims presented to the Court as provided for in 42 U.S.C. § 2000e-5 and therefore denies defendant's motion.

FACTS

The plaintiff, a former employee of Chemico, alleges that he was terminated by the defendant on August 1, 1975, because of his national origin and his adherence to the Jewish religion. He also alleges that Chemico refused to rehire him later because of his national origin and religion. These alleged discriminatory acts are prohibited by both federal and state laws. 42 U.S.C. § 2000e 2(a)(1) (1970); N.Y. Exec. Law § 296(1) (McKinney Supp. 1977).[1]

The plaintiff filed a discrimination charge with the Equal Employment Opportunity Commission ("EEOC") on May 6, 1976, within the filing period. The EEOC referred the matter to the New York State Division of Human Rights ("HRD") as mandated in 42 U.S.C. § 2000e-5(c).[2] HRD is the state agency charged with the enforcement of state law prohibiting

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1. 42 U.S.C. § 2000e-2(a) provides:

> "It shall be an unlawful employment practice for an employer--(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual . . . because of such individual's race, color, religion, sex, or national origin; . . . ."

N.Y. Exec. Law § 296(1) provides:

> "It shall be an unlawful discriminatory practice: (a) For an employer or licensing agency, because of the age, race, creed, color, national origin, sex, or disability, or marital status of any individual, to refuse to hire or employ or to bar or to discharge from employment such individual. . . ."

2. 42 U.S.C. § 2000e-5(c)

> "In the case of an alleged unlawful employment practice occurring in a State, or political subdivision of a State, which has a State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from

employment discrimination. That agency reviewed the complaint which alleged age as well as religious discrimination. New York's statute expressly prohibits age discrimination whereas Title VII does not. Compare 42 U.S.C. § 2000e-2 (a)(1) with N.Y. Exec. Law § 296(1) (McKinney Supp. 1977).

On March 4, 1977, while the matter was still pending before HRD, the plaintiff again requested EEOC to investigate his claim because of the state's delay in resolving his claims. HRD subsequently reached a determination on April 28, 1977 that the plaintiff's claims were meritless. Its determination was based on the findings that the plaintiff was not rehired because one employee who was rehired had greater seniority than the plaintiff, that another employee who was rehired filled a lesser position than that previously held by the plaintiff, and that the plaintiff's creed and age were not factors considered in Chemico's selection. HRD did not, however, make an express finding that his creed and age were not factors considered by Chemico in its decision to discharge

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> such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, no charge may be filed under subsection (b) of this section by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated, provided..."

Also see 29 C.F.R. 1601.12(b)(1)(iii, iv) (1977)

> "The aggrieved party and any person filing a charge on behalf of an aggrieved party shall be notified, in writing, that the document which he or she sent to the Commission has been forwarded to the State or local agency. . . and that unless the Commission is notified to the contrary, on the termination of State or local proceedings, or after 60. . . days have passed, whichever occurs first, the Commission will consider the charge to be filed with the Commission and commence processing the case. . . ."

him. On administrative appeal, HRD's determination was affirmed on November 25, 1977 by the State Human Rights Appeals Board on the grounds that HRD's findings were not arbitrary or capricious.

The plaintiff then appealed the decision to the New York State Supreme Court, Appellate Division, First Department, under N.Y. Exec. Law §§ 296-298. That intermediate appellate court affirmed the decision on February 27, 1978. The matter was not appealed further.

On May 11, 1978, the EEOC reviewed the HRD's findings, the complaint, and the record and determined that there was no reasonable cause to believe that the plaintiff's claims were valid. It then issued a notice of right to sue. Plaintiff subsequently instituted this action pro se, and requested a de novo trial under Title VII.

DISCUSSION

The issue presented to the Court by the instant motion to dismiss the complaint or, in the alternative, for summary judgment is whether the prior state appellate court review of the state agency's action under state law bars a federal action under Title VII.

Chemico urges this Court to adopt the approach followed in Mitchell v. National Broadcasting Co., 553 F.2d 265 (2d Cir. 1977) and dispose of this motion similarly. In Mitchell, the plaintiff had instituted an action under 42

"Upon notification of the termination of State or local proceedings or the expiration of 60 (or 120) days, whichever occurs first, the Commission will consider the charge to be filed with the Commission and will commence processing the case."

U.S.C. § 1981, but prior to instituting the federal action, the plaintiff had brought an action under the N.Y. Human Rights Law with HRD. Only after she was denied relief and after instituting an appeal from HRD's decision with the Appeals Board did that plaintiff seek federal relief by filing a charge of discrimination with the EEOC. The EEOC issued a finding of no probable cause after HRD's determination was affirmed by the Appeals Board and the Appellate Division.

The plaintiff then instituted an action under § 1981 in federal court, but the action was dismissed on the ground of res judicata. On appeal, the Court of Appeals held that the federal action was indeed barred by res judicata because the plaintiff had sought state court review of the state agency determination. Id. at 276. However, it expressly reserved judgment on the question of whether the principle of res judicata would bar a similar action under Title VII. Id. at 275 n.13.

In comparison, the plaintiff in this action initially filed a complaint with the EEOC, was referred to HRD, and resumed his request that the EEOC investigate his charges prior to HRD reaching its conclusion. Like the complaint in Mitchell, the plaintiff, commenced this action in federal court after failing in his appeal to the state Appellate Division regarding the Appeals Board's affirmance of the HRD determination.

The similarity of the facts of the instant action to those in Mitchell, Chemico contends, is sufficient to justify a ruling similar to that in Mitchell, particularly since Title VII does not require exhaustion of state judicial remedies prior to instituting federal claims and since the

plaintiff chose not to appeal the Appellate Division's affirmance to the New York State Court of Appeals. While Title VII does require that the EEOC defer complaints to HRD, 42 U.S.C § 2000e-5(c)(1970), it does not require that complainants exhaust state judicial remedies before seeking federal relief. On the contrary, Title VII allows the filing of a complaint with the EEOC 60 days after proceedings are initiated under state law. Id. Chemico contends that if the plaintiff had sought federal relief immediately after the rulings from the HRD and from the State Appeals Board rather than appealing to the state court, his right to a de novo federal trial would have been preserved. See, Voutsis v. Union Carbide Corp., 452 F.2d 889 (2d Cir.), cert. denied, 406 U.S. 918, 92 S.Ct. 1768, 32 L.Ed.2d 117(1971); Batiste v. Furnco Construction Corp., 503 F.2d 447 (7th Cir.), cert. denied, 420 U.S. 928, 95 S.Ct. 1127, 43 L.Ed.2d 399 (1975).

In determining that state court review barred a subsequent federal court action under § 1981, the Court in Mitchell stressed that §296 of the New York Executive Law is at least as broad as the federal constitution and civil rights laws in prohibiting discrimination in employment. 553 F.2d at 269-70, that the issues addressed in the state proceedings were the same as those before the district court, id. at 270, that the standard for evaluating the plaintiff's claims under state law is comparable to that for evaluating a summary judgment motion in the federal courts, id. at 271, and that the New York state courts are not less capable than federal courts in resolving the legal sufficiency of a complaint or less sensitive to claims under the State Human Rights Law which may also be actionable under federal statute.

Id. at 276. The issue to be determined here is whether these considerations compel a finding of a similar bar of actions brought under Title VII.[3]

The principles of collateral estoppel and res judicata are made applicable to federal courts with respect to prior state court judgments by 28 U.S.C. § 1738. That statute obligates the federal courts to give full faith and credit to judgments of state courts of competent jurisdiction.[4] The federal court, however, need only give that state judgment the same effect as it would be given in the state in which it was rendered. Mitchell v. National Broadcasting Co., 553 F.2d at 274.[5] Ordinarily, this requires an analysis of the res judicata effect of the state court proceedings within the state and an examination of the local law of res judicata and collateral estoppel. Winters v. Lavine, 574 F.2d at 52 (2d Cir. 1978).

While section 1738 mandates an analysis and application of the state doctrines of res judicata and collateral estoppel, other considerations must also be evalu-

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3. A review of decisions of sister courts in other circuits has revealed sharply conflicting opinions. Compare Beck v. Mather, 417 F. Supp. 648 (W.D. Va. 1976)(prior state court dismissal not res judicata) with Bennun v. Board of Governors, 413 F. Supp. 1274 (D.N.J. 1976)(prior state court determination is res judicata).

4 28 U.S.C. § 1738 extended the Full Faith and Credit provisions of the U.S. Constitution Article 4, § 1 to all courts, federal as well as state. Davis v. Davis, 305 U.S. 32, 40, 59 S.Ct. 3, 6, 83 L.Ed. 26, 29 (1938). Also see Winters v. Lavine, 574 F.2d 46, 54 (2d Cir. 1978); American Mannex Corp. v. Rozands, 462 F.2d 688, 690 (5th Cir.), cert. denied, 409 U.S. 1040, 93 S.Ct. 524, 34 L.Ed.2d 489 (1972).

5 But see Theis, Res Judicata in Civil Rights Act Cases: An Introduction to the Problem, 70 Nw. U.L. Rev. 859, 876 "Although section 1738 counsels the federal judge to resolve all res judicata problems in all cases as would a state judge, this admonition is unrealistic and impossible when the federal judge exercises a concurrent jurisdiction granted for special reasons."

ated. As the Mitchell court noted, even if a state court's determination had a res judicata or collateral estoppel effect on other courts of that state, federal courts are not always bound by such prior state decisions. "'Other well-defined federal policies, statutory or constitutional, may compete with those policies underlying [28 U.S.C. §] 1738 [which provides that the federal courts give full faith and credit to judgments of state courts of competent jurisdiction].'" Id. at 274 (citing American Mannex Corp. v. Rozands, 462 F.2d 688, 690 (5th Cir.), cert. denied, 409 U.S. 1040, 93 S.Ct. 524, 34 L.Ed.2d 489 (1972)). Especially in civil rights actions, the res judicata and collateral estoppel requirements of § 1738 have not been rigidly applied. See Mitchell, supra at 274; McCune v. Frank, 521 F.2d 1152, 1156 n.10 (2d Cir. 1975); also see discussion in Winters, supra at 56. But the mere fact that a federal civil rights action is involved is not sufficient reason to deny a state court determination the full faith and credit required by § 1738. Mitchell v. National Broadcasting Co., supra.

Recent decisions in this circuit have supported the conclusion that state court determinations have res judicata or collateral estoppel effect on subsequent federal civil rights actions. Winters v. Lavine, supra; Mitchell v. National Broadcasting Co., supra. Winters was an action under 42 U.S.C. § 1983 (accord Hammer v. Town of Greenburgh, 440 F. Supp. 27 (S.D.N.Y. 1977)) and Mitchell was instituted under 42 U.S.C. § 1981. Several distinctions exist, however, between the statutes under which those cases were tried and Title VII. Under Title VII, the statutory prerequisite for instituting an action in federal court is that the complainant first

submit his claim to state and federal agencies. 42 U.S.C. § 2000e-5, supra. This requirement is not present under § 1981 or § 1983. The purpose of this requirement is to permit the state agency to attempt to resolve the matter under state law through voluntary conciliation and persuasion. Alexander v. Gardner-Denver, 415 U.S. 36, 44, 94 S.Ct. 1011, 1017, 39 L.Ed.2d 147, 156 (1974); 29 C.F.R. 1601-12(a)(1977). Furthermore, Title VII provides for a de novo hearing by a federal court once the statutory prerequisites have been met. The Court must be mindful of these distinctions and their implications in evaluating the applicability of the holdings in Winters and Mitchell to the action at bar and in assessing the federal policies embodied in Title VII.

A review of the history of Title VII indicates that Congress intended the policy against discrimination, as manifested in the Civil Rights Act of 1964, be given the highest priority. Newman v. Piggie Park Enterprises, 390 U.S. 400, 402, 88 S.Ct. 964, 19 L.Ed.2d 1263(1968)(per curiam). "Consistent with this view, Title VII provides for consideration of employment discrimination claims in several forums . . . . And, in general, submission of a claim to one forum does not preclude a later submission to another. Moreover, the legislative history of Title VII manifests a congressional intent to allow an individual to pursue independently his rights under both Title VII and other applicable state and federal statutes. The clear inference is that Title VII was designed to supplement, rather than supplant, existing laws and institutions relating to employment discrimination." Alexander v. Gardner-Denver Co., 415 U.S. at 47-49, 94 S.Ct. at 1019-1020, accord, 29 C.F.R. 1601.12(a)(1977). Accordingly, Title VII actions should not be subject to the collateral

estoppel effects of section 1738 where the result would be the possible frustration of the congressional objectives embodied in Title VII, to wit, the availability of separate federal and state remedies and the independent adjudication of federal claims.

An earlier Title VII case involving circumstances similar to those presented in the action at bar discussed these policy considerations. In Benneci v. Dep't of Labor, 388 F. Supp. 1080 (S.D.N.Y. 1975), the plaintiff claimed that the defendant had engaged in unlawful employment discrimination and discriminated against him because of his religion and national ancestry in violation of New York's Human Rights Law. After HRD determined that there had been no unlawful discriminatory practice, he appealed to the Appeals Board which affirmed. Benneci then appealed to the state appellate court which also affirmed. Having failed to secure relief from the state, he filed a complaint with the EEOC. When the EEOC determined that there was no reasonable cause to believe that an unlawful practice had been engaged in, plaintiff brought his action in federal court.

In refusing to give the state court's affirmance res judicata effect, the district court judge discussed the congressional objectives embodied in Title VII. In his opinion, Judge Knapp cited the Supreme Court's unanimous decision in Alexander v. Gardner-Denver Co., supra, wherein it was noted that the purpose of Title VII was to assure equality of employment opportunities through cooperation and voluntary compliance. Title VII incorporates a procedure whereby existing state and local agencies as well as the

EEOC would have an opportunity to settle disputes before the complainant was permitted to commence an action in federal court. The court in Benneci reasoned that to grant defendant's motion for summary judgment because the plaintiff had sought to comply with these procedures would defeat the general purpose of the statutory scheme. 388 F. Supp. at 1081. Furthermore, where the complainant has manifested a preference for the federal forum by initiating his action with EEOC rather than the state agency, he may be less inclined to actively and fully pursue his state claim, as envisioned by the statutory scheme, or to seek review of arbitrary state agency actions, if a possible loss of his federal claim would result. This statutory scheme is unique to Title VII actions and manifests Congress' intent that there be an initial resort to state remedies. A bar of a federal action because of collateral estoppel may well frustrate this congressional purpose. Consequently, a complainant's resort to state court review should not bar a Title VII action as it would under other federal civil rights statutes.

A further reason for distinguishing an action under Title VII from actions under other federal civil rights statutes is that Title VII expressly provides for a de novo hearing by a federal court. Although state courts may be said to be as capable of evaluating claims of discrimination as federal courts, where the reviewing state court does not have plenary power to try the matter anew, the barring of an independent federal action on grounds of collateral estoppel would have the effect of limiting the availability of a de novo hearing. Such a holding would impliedly

restrict the express provision for a second independent hearing to those instances where the state proceedings had been terminated without state court review. There being no limitation of this nature on the availability of a de novo hearing imposed by the Congress, the insertion of a qualification by judicial fiat is unwarranted.

CONCLUSION

While Benneci was decided prior to the decision in Mitchell, the reasoning of Benneci is consistent with the later analysis of the Second Circuit Court of Appeals in Mitchell. The policy embodied in Title VII was intended to be effectuated by the entire procedure set forth in §2000e-5 including the provision for a second, independent federal hearing. Truncating the procedure on the grounds of res judicata under these circumstances is not mandated by Mitchell and would be contrary to the apparent intent of Congress.

Accordingly, the defendant's motion to dismiss or, alternatively, for summary judgment is denied.

SO ORDERED.

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit held at the United States Court House, in the City of New York, on the fifteenth day of October, one thousand nine hundred and eighty.

Present:

HON. J. EDWARD LUMBARD

HON. HENRY J. FRIENDLY

JON. THOMAS J. MESKILL

Circuit Judges.

[SEAL OF United States Court of Appeals, Second Circuit Filed: Oct. 15, 1980]

Rubin Kremer, Plaintiff-Appellant v. Chemical Construction Corp., Defendant-Appellee.	79-7748 [79-7748]

A petition for a rehearing having been filed herein by counsel for the appellant Rubin Kremer,

Upon consideration thereof, it is

ORDERED that said petition be and it hereby is denied.

/s/ A. Daniel Fusaro
A. Daniel Fusaro
Clerk

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 15th day of October, one thousand nine hundred and eighty

----------X

RUBIN KREMER,

Plaintiff-Appellant,

v.

CHEMICAL CONSTRUCTION CORPORATION,

Defendant-Appellee.

----------X

[SEAL OF United States Court of Appeals Second Circuit Filed Oct 15, 1980]

79-7748

[79-7748]

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the plaintiff-appellant, and a poll of the active judges having been taken, and there being no majority in favor thereof,

UPON CONSIDERATION THEREOF, it is

Ordered that said petition be and it hereby is DENIED.

Judges Oakes and Newman voted in favor of rehearing in banc.

/s/ Wilfred Feinberg
Chief Judge

Pertinent Parts of Statutes Involved

[42 U.S.C.] § 2000e-2. Unlawful Employment Practices--Employer Practices

"(a) It shall be an unlawful employment practice for an employer--

"(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or"

[42 U.S.C.] § 2000e-5. Enforcement Provisions--Power of Commission to Prevent Unlawful Employment Practices

" . . . .

"(c) In the case of an alleged unlawful employment practice occuring in a State, or political subdivision of a State, which has a State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, no charge may be filed under subsection (b) of this section by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated . . . ."

[N.Y. EXEC. LAW] § 296(1)(a). Unlawful Discriminatory Practices

"1. It shall be an unlawful discriminatory practice: (a) For an employer or licensing agency, because of the age, race, creed, color, national origin, sex, or disability, or marital status of any individual, to refuse to hire or employ or to bar or to discharge from employment such individual . . . ."

[N.Y. EXEC. LAW] § 297-a. State Human Rights Appeal Board

" . . . .

"7. The [Human Rights Appeals] board may affirm, remand or reverse any order of the division or remand the matter to the division for further proceedings in whole, or with respect to any part thereof, or with respect to any party, provided however that the board shall limit its review to whether the order of the division is:

" . . . .

"e. not arbitrary, capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion."

[N.Y. EXEC. LAW] § 298. Judicial Review and Enforcement

"Any complainant, respondent or other person aggrieved by any order of the board may obtain judicial review thereof . . . in a proceeding as provided in this section. Such proceeding shall be brought in the appellate division of the supreme court. . . ."

[N.Y. CIV. PRAC. LAW] § 7803. Questions Raised

"The only questions that may be raised in a proceeding under this article are:

" . . . .

"3. whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion, including abuse of discretion as to the measure or mode of penalty or discipline imposed; or

"4. whether a determination made as a result of a hearing held, and at which evidence was taken, pursuant to direction by law is, on the entire record, supported by substantial evidence."

79—7748

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

RUBIN KREMER,

Plaintiff-Appellant,

v.

CHEMICAL CONSTRUCTION CORPORATION,

Defendant-Appellee.

On Appeal From The United States District Court
For The Southern District of New York

BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AMICUS CURIAE, IN SUPPORT OF PETITION FOR REHEARING EN BANC

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IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 79-7748

RUBIN KREMER,

Plaintiff-Appellant,

v.

CHEMICAL CONSTRUCTION CORPORATION,

Defendant-Appellee.

On Appeal From The United States District Court
For The Southern District of New York

BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AMICUS CURIAE, IN SUPPORT OF PETITION FOR REHEARING EN BANC

STATEMENT OF INTEREST

The Equal Employment Opportunity Commission is the agency established by Congress and the President to administer, interpret, and enforce federal employment discrimination statutes including Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e et seq. (1976). See Reorganization Plan No. 1 of 1978, 43 F.R. 19807 (May 9, 1978). Private Title VII actions provide the Commission with essential assistance in securing the elimination of employment discrimination. See Alexander v. Gardner-Denver Co., 415 U.S. 36, 45 (1974).

The panel's decision in this case requires Title VII complainants, whose state administrative claims have been dismissed by a state agency, to choose between asking a state court to reinstate their claims and pursuing their Title VII claims in federal court. Because, in accordance with the unanimous views of all other courts to have addressed the matter, we believe that Congress clearly intended victims of employment discrimination to be free to pursue state remedies without jeopardizing their right to de novo hearings in federal court, we offer our views to the Court and urge the Court to rehear the appeal en banc.

STATEMENT OF THE CASE

Rubin Kremer was discharged from his job as an engineer for Chemical Construction Company (Chemico) on August 1, 1975. Some employees who were laid off with Kremer were later rehired, but Kremer was not. After his layoff, Kremer applied for a number of engineering positions advertised by Chemico but was not hired.

On May 6, 1976, Mr. Kremer filed a charge with the Equal Employment Opportunity Commission claiming that he was discharged and not rehired because of his religion and national origin (A47). The Commission, in accordance with the requirement of §706(c) of Title VII, 42 U.S.C. 2000e-5(c), deferred Mr. Kremer's charge to the New York State Division of Human Rights (NYHRD), the state administrative agency charged with enforcement of the New York Human Rights Law, N.Y. Exec. L. 285 et seq. (McKinney 1972 and Supp. 1976). The NYHRD conducted an ex parte investigation which included interviews with Mr. Kremer, who was unrepresented by counsel, and a review of documents submitted by Chemico. After its investigation the NYHRD issued a determination finding no probable cause to believe that Chemico's decision not to rehire Mr. Kremer was discriminatory. (A.100). The NYHRD made no finding as to the original discharge. Mr. Kremer, still unrepresented by counsel, appealed to the Human Rights Appeal Board under N.Y. Executive Law §297-a. The Appeal Board affirmed the NYHRD's determination. (A.103).

Proceeding pro se, Mr. Kremer filed a petition with the Appellate Division of the Supreme Court of New York to set aside the NYHRD determination. See §298 of the N.Y. Human Rights Law and CPLR Article 78. (A.43). His petition was denied by the Appellate Division. (A.69). Mr. Kremer did not seek review by the New York Court of Appeals.

Thereafter, the EEOC, giving full weight to the determination of the NYHRD (see §706(b) of Title VII) found that there was not reasonable cause to believe that Mr. Kremer's Title VII charge was true and issued him a notice of right to sue (A.6, 120-21). Mr. Kremer then timely brought this suit (A.3). After a panel of this Court, in another pro se case, Sinicropi v. Nassau County, 601 F.2d 60, cert. denied, ____U.S.____, 100 S.Ct. 488 (1979), had held that judicial review of NYHRD determinations had res judicata effect on subsequent Title VII actions, Judge Sofaer granted Chemico's motion to dismiss, but wrote a long critique explaining why he felt that Sinicropi had been wrongly decided. 477 F.Supp. 587 (S.D.N.Y. 1979).

A panel of this Court affirmed. The panel held that Sinicropi controlled and that only the full Court sitting en banc could properly consider the argument that the decision of another panel was erroneous. Slip Op. at 3231. The panel rejected the argument that, because Mr. Kremer filed his petition for judicial review over a year before Sinicropi had been decided, Sinicropi should not be applied to this case.

The panel held that the Sinicropi decision was foreshadowed in Mitchell v. National Broadcasting Co., 553 F.2d 265 (2d Cir. 1977), a case brought under 42 U.S.C. 1981. The panel concluded that the exception to the general rule that judicial decisions have retroactive effect, announced in Chevron Oil Co. v. Huson, 404 U.S. 97 (1971), therefore, did not apply. Slip Op. at 3237.

REASONS FOR GRANTING THE PETITION

We share the views expressed by Judge Feinberg, dissenting in Mitchell v. National Broadcasting Co., supra, 553 F.2d at 277, by Judge Sofaer in his careful analysis in this case, by the Eighth Circuit in Gunther v. Iowa State Mens Reformatory, 612 F.2d 1079 (8th Cir. 1980), cert. denied, 48 U.S.L.W. 3763 (May 27, 1980), and by the petition for rehearing. We join in asking that the Court en banc reconsider the Sinicropi holding which bound the panel in this appeal.

In our view Sinicropi applied res judicata principles inflexibly and gave no attention to countervailing policies embodied in the substantive federal law at issue. For reasons we discuss below, the use of res judicata to prevent access to the federal courts to enforce federal law is scarcely compelled by the doctrine itself. Where its use defeats a strong federal substantive policy by giving deference to the type of state administrative and judicial proceedings which Congress expressly rejected for enforcement of federal

laws, a better balance between res judicata and federal substantive law must be struck.

Sinicropi thwarts the clear Congressional purpose of affording Title VII complainants a right to a de novo hearing in court; i.e., to have the fact finding process performed not by state or federal bureaucrats but by judges. The major effect of the rule, aside from creating a trap whereby Title VII complainants, especially those unrepresented by counsel, will lose their right to a hearing in federal court, will be to undermine the effectiveness of state remedies by creating a strong incentive to forego attempts to correct state errors within the state system in order to preserve federal rights.

a. Res judicata as the panel noted in Mitchell, supra, 553 F.2d at 274, is a flexible doctrine. It "ensures the finality of litigation"; "bars vexatious litigation"; and "frees the courts to resolve other disputes." Brown v. Felsen, 442 U.S. 127, 131 (1979). It reflects the desirability of preserving judicial resources and of creating certainty in legal relations. But it does not require that these goals be achieved at all costs.

The Supreme Court has noted that exceptions to res judicata are appropriate when, in given circumstances, the policy favoring res judicata is weak and the policies of substantive federal law would be undermined by rigid adherence

to the doctrine. Brown v. Felsen, supra, 442 U.S. at 132.[1] Cf. Occidental Life Insurance Co. v. EEOC, 432 U.S. 355, 367 (1977)(state policies of repose embodied in state statutes of limitations are incompatible with the substantive policies of Title VII).

Similarly, it is established that the res judicata component of 28 U.S.C. 1738 requiring federal courts to give full faith and credit to state courts is subject to exception in cases where "[o]ther well-defined federal policies, statutory or constitutional" would be adversely affected by deferral to state court determinations. American Mannex Corp. v. Rozands, 462 F.2d 688, 690 (5th Cir.), cert. denied, 409 U.S. 1040 (1972). See also Batiste v. Furnco Construction Corp., 503 F.2d 447, 450 (7th Cir. 1974), cert. denied, 420 U.S. 928 (1975).[2]

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1 / Commentators have similarly urged exceptions to the general rule governing res judicata. For example, the Tentative Draft No. 5 of the Restatement of the Law, Second, Judgments, §61.1 (1978), provides that the general rule should not apply when a state court has no power to enforce a federal law. Under those circumstances a plaintiff "who has litigated a state claim in state court is not barred from an action in the federal court in which he may press his claim against the same defendant under the federal statute." Id. §61.1(c) comment (1) at 189. The draft Restatement provides another relevant exception in §61.2(d) where the "judgment in the first action was plainly inconsistent with the fair and equitable implementation of a statutory or constitutional scheme, or it is the sense of the scheme that the plaintiff should be permitted to split his claim." See also §61.2(c). Id.

2 / While it is true that under 28 U.S.C. 1738 federal courts ordinarily defer to judgments of state courts, it is, as the Court recognized in Alexander v. Gardner Denver, (Footnote continued)

b. As Judges Feinberg and Sofaer and the petition note, Congress intended (1) to provide de novo judicial proceedings in Title VII cases rather than to limit the parties to judicial review of administrative determinations and (2) to use state laws to supplement but not supplant the federal remedy. Sinicropi is incompatible with both of these Congressional policies.

1. In Alexander v. Gardner-Denver Co., supra, 415 U.S. at 56, the Supreme Court, in a unanimous decision, declared that a Title VII claimant has a "statutory right to attempt to establish his claim in a federal court." The Court stated: "The purpose and procedures of Title VII indicate that Congress intended federal courts to exercise final responsibility for enforcement of Title VII." Id. The Court concluded that it would be inconsistent with the purposes of Title VII to preclude a Title VII suit because of a prior arbitral decision involving the same claim. See also Chandler v. Roudebush, 425 U.S. 840, 844 (1976) ("It is well established that §706 of the Civil Rights Act of 1964 accords private-sector employees the right to de novo consideration of their Title VII claims [in federal court]").

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2 / (Footnote continued)
supra, 415 U.S. at 54, equally true that arbitration awards such as the one held not to have res judicata effect in that case, are ordinarily recognized as binding in subsequent federal court actions. Similarly, the determinations of state administrative agencies are often afforded res judicata effect, at least in state courts. See Batiste v. Furnco Construction Corp., supra, 503 F.2d at 450. Whether unreviewed decisions of the NYHRD are entitled to res judicata effect in New York courts is not clear. See Mitchell v. National Broadcasting Co., supra, 553 F.2d at 273.

As the Court noted in Chandler, Congress in 1972 expressly chose not to make Title VII rights subject to administrative oversight. It defeated attempts to create a federal administrative agency with powers to hear and determine cases, subject to judicial review. 425 U.S at 848-52. Instead, it retained the EEOC's power to investigate and make determinations of reasonable cause. Whatever findings the EEOC made, however, were to be irrelevant in any subsequent suit.

It strains credulity to believe that when Congress determined that federal bureaucrats could not bind the disputants after a federal ex parte investigation it intended to permit state bureaucrats to do so after a state ex parte investigation. See Voutsis v. Union Carbide Corp., 452 F.2d 889 (2d Cir. 1971), cert. denied, 406 U.S. 918 (1972), cited with approval in Alexander v. Gardner-Denver Co., supra, 415 U.S. at 49 n.11. The fact tnat the dismissal by the NYHRD was confirmed as not an abuse of discretion by a state court--a matter we discuss below--does not alter the considerations which dictate that thd plaintiff should have a trial de novo of Title VII claims in federal court. The strong policy of Title VII which dictates against deferral by federal courts to determinations of state or federal administrative agencies applies with equal force to determinations which have been affirmed without de novo review, by state courts.

2. Aside from insisting on de novo reviews of adminstrative determinations, Congress intended state proceedings to supplement rather than supplant Title VII rights. As this Court held in Voutsis v. Union Carbide Corp., supra, 452 F.2d at 893:

> The Congressional policy here sought to be enforced is one of eliminating employment discrimination, and the statutory enforcement scheme contemplates a resort to the federal remedy if the state machinery has proved inadequate. The federal remedy is independent and cumulative.

See also New York Gaslight Club, Inc. v. Carey, ____U.S.____, 48 U.S.L.W. 4645, 4648 (June 9, 1980) ("It is clear. . .that Congress viewed proceedings before the EEOC and in federal court as supplements to available state remedies for employment discrimination"); and Alexander v. Gardner-Denver Co., supra, 415 U.S. at 47-48. Cf. Johnson v. Railway Express Agency Inc., 421 U.S. 454, 461 (1975); and General Telephone Co. of the Northwest Inc. v. EEOC, ___U.S.____, 100 S.Ct. 1698, 1707 (1980).

This complementary enforcement scheme was devised, as the Court recognized in Voutsis, because, although Congress wanted to preserve state and local enforcement schemes, it realized that state and local laws varied widely in effectiveness because of inadequate legislation, inadequate procedures and inadequate budgets. Voutsis, supra, 452 F.2d at 894. Therefore "Title VII. . .provides a supplemental right to sue in federal court if satisfactory relief is not obtained in state forums"

New York Gaslight Club, Inc. v. Carey, 48 U.S.L.W. at 4649.

The panel's conclusion in Mitchell that preclusion of a federal court Title VII claim is appropriate in this context because a complainant can satisfy Title VII's deferral requirement without resorting to state court remedies misses the point. The fact that a complainant may be able to satisfy the minimum requirements of Title VII's deferral provision without going into state court does not mean that Congress' intent that Title VII "supplement, rather than supplant, existing laws and institutions relating to employment discrimination," Alexander v. Gardner-Denver Co., supra, 415 U.S. at 48-49, is served by a rule which allows a complainant to obtain review of the dismissal of his state claim only at the expense of his right to a federal court hearing of his Title VII claim.

3. The New York procedures are precisely those which Congress rejected for enforcement of Title VII and which are inadequate to replace the federal scheme. The proceedings begin with a perfunctory ex parte administrative investigation which results in either a finding of probable cause or in dismissal if the investigator is unable to obtain enough information to persuade him and his supervisors that enough evidence exists to warrant further proceeding. N.Y. Executive Law §297(2)(McKinney. Supp. 1978). Mr. Kremer's, Ms. Sinicropi's and Ms. Mitchell's claims never survived this stage. Only if probable cause is found and conciliation efforts fail

is an adversarial hearing held. N.Y. Exec. Law 297(4)(a). (McKinney. Supp. 1978). After the hearing, the NYHRD must make findings and, if it finds the complaint valid, may order relief. N.Y. Exec. Law §297(4)(c)(McKinney. Supp. 1978).

The approach taken in Sinicropi and this case, involves artificial distinctions for res judicata purposes between different stages of the remedial scheme set up by New York State to handle claims of employment discrimination. The limited state court review which Mr. Kremer obtained is an integral part of his state administrative remedy. See New York Gaslight Club, Inc. v. Carey, supra, 48U.S.L.W. at 4649. ("The New York state procedure to which respondent's charge was referred provides for adversarial quasi-judicial hearings leading to findings of fact, administrative appeals and judicial review" (emphasis added).) To treat it differently for res judicata purposes will produce anomalous results in many cases and ultimately will do a disservice to the state's remedial efforts.

The Human Rights Law provides a limited two-tiered appellate procedure. Appellate review of orders of the NYHRD dismissing complaints at the end of the NYHRD investigation is particularly limited. The Human Rights Appeal Board, N.Y. Exec. Law §297-a(7)(McKinney) and the Appellate Division of the Supreme Court, N.Y. Exec. Law §298 (McKinney. Supp. 1978) or C.P.L.R. Article 78, are restricted to determining only whether the NYHRD's findings are arbitrary and capricious or an abuse of discretion. The findings of the agency are

binding if they are supported by the administrative record.

It is clear that the type of limited review, based on the administrative record, which can be obtained under the New York law cannot, precisely because of its limited nature, transform an administrative fact finding proceeding into the equivalent of a judicial trial.

When a complainant is dismissed at the first stage of the administrative process, like Mr. Kremer was, it is especially inappropriate to attach res judicata effect to his appeal to state court. In that situation the complainant is merely seeking to obtain a full administrative hearing which he feels he has been unfairly denied. He is not seeking nor can be obtain de novo review in the state court and the court can only decide whether the NYHRD determination accords with the result of its investigation no matter how inadequate that investigation may be. Nor can the state court give any relief other than a remand to the NYHRD for further proceedings. Thus the appeal is merely part of the administrative process rather than the de novo review Congress intended.

The Mitchell panel's reliance on perceived similarities between the procedure followed by the NYHRD when it dismisses a complaint for lack of probable cause and the summary judgment procedures in federal courts misses the point. However

similar the standards may be,[3/] there will always be a critical difference, since, in the state proceedings, the decision to dismiss is made by employees of a state agency and not by federal judges whom Congress intended to have the ultimate authority in Title VII cases.

The fact that the final determination under the state procedure was rendered by a court therefore does not mandate a different result in this case than would be reached in a case involving arbitration or administrative determinations.

4. Sinicropi does a disservice to the state anti-discrimination procedures by encouraging complainants to foresake their rights to seek state review of adverse decisions of the NYHRD. The state legislature specifically included limited judicial review as part of the procedure it devised to remedy employment discrimination. Such appellate review plays an important role in any adjudicative scheme by providing a

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3/ There is considerable doubt that New York courts consistently apply the standard articulated in Mayo v. Hopeman Lumber & Manufacturing Co., 33 A.D. 2d 310, 307 N.Y.S. 2d 691 (1979), as the Mitchell panel assumed. Other New York courts have indicated that dismissals for want of probable cause will not be reversed solely because material facts are in dispute. See discussion in Kremer v. Chemical Construction Corp., 477 F.Supp. at 592 n.7. In this case a dismissal for no probable cause was confirmed by the Appellate Division dispite the fact that numerous, material factual disputes are apparent in the record.

mecnanism for establishing uniform standards and for controlling agency excesses.

After Sinicropi, it seems unlikely that any reasonable, informed complainant will forego his right to a trial de novo in federal court in favor of a limited review of an adverse agency determination before a state court which could, at best, remand his claim to the agency for futher proceedings. Thus, the Sinicropi rule will serve only as a trap for unwary complainants and a strong deterrent to informed complainants' seeking review of state agency determinations.[4/]

Respectfully submitted,

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4/ Mr. Kremer also argues that the Sinicropi rule should not be applied to his case, because he applied for review to the state court more than a year before Sinicropi was decided. We agree with Mr. Kremer's position. The panel's holding that the result in Sinicropi was foreshadowed by the earlier decision in Mitchell v. National Broadcasting Co., supra, is unconvincing because, as appellant points out, a number of courts, including the district court in this case had held that Mitchell did not apply to Title VII cases.

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing brief were today mailed , first-class postage prepaid, to the following counsel of record:

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